89-1829

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

FMC CORPORATION,
Petitioner,

vs.

TODD GANDER,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

I. Whether evidence and instruction should be permitted on the issues of the effect of taxes on future lost earnings and the non-taxability of a jury's award of damages in a diversity action.

II. Whether a circuit court of appeals can recognize that a jury instruction is misleading, confusing, unclear and ambiguous, recommend against its use in future cases, and yet permit a judgment to stand that was based upon that instruction.

LIST OF PARTIES

The parties to this proceeding are petitioner FMC Corporation and respondent Todd Gander. In compliance with Supreme Court Rule 28, petitioner attaches Appendix H as a list of its parents, subsidiaries, and/or affiliates.

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TABLE OF AUTHORITIES

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The Petitioner, FMC Corporation, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in the above-entitled proceeding on January 12, 1990.

OPINION BELOW

The opinion of the Court of Appeals for the Eighth Circuit is reported at 892 F.2d 1373 (8th Cir. 1990) and is reprinted in the Appendix at p. A-10.

JURISDICTIONAL STATEMENT

Invoking diversity jurisdiction under 28 U.S.C. §1332, respondent brought this suit in the United States District Court for the Eastern District of Missouri. On March 15, 1988, the

jury returned a verdict in favor of plaintiff and the trial judge entered judgment in the amount of $200,000. *See infra* Appendix at A-1. On July 13, 1988, the trial judge amended the jury's award to $2,000,000 and entered judgment in that amount. *See infra* Appendix at A-2. On November 8, 1988, the trial judge denied the petitioner's motions for reconsideration and for other relief. *See infra* Appendix at A-8.

On petitioner's appeal, the Eighth Circuit, on January 12, 1990, affirmed the judgement of the District Court. *See infra* Appendix at A-9. On February 22, 1990, the Eighth Circuit denied petitioner's petition for rehearing. *See infra* Appendix at A-48.

The jurisdiction of this Court to review the judgment of the Eighth Circuit is invoked under 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

This matter stems from a personal injury case tried before the United States District Court for the Eastern District of Missouri under diversity jurisdiction. The case was tried using the substantive law of Missouri on theories of strict products liability and negligence.

During trial FMC was prevented from cross-examining or arguing regarding the effects of federal income tax on plaintiff's lost income stream and on the jury's award, and from submitting instructions on those issues. Further, over FMC's objections, a single verdict form propounded by plaintiff was submitted to the jury referring both to the strict liability theory and to the negligence theory and further asking the jury to assess plaintiff's "total damages."[1]

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[1] Under Missouri law then in effect, a plaintiff's contributory fault did not reduce a defendant's liability on a strict liability claim. A plaintiff's contributory negligence did, however, reduce recovery on a negligence claim to the extent the plaintiff was found to be at fault.

The jury found for plaintiff on the strict liability theory, and assessed his fault at 90% on the negligence theory. The jury found total damages to be $2,000,000.00. The verdict form's closing note, however, stated that "the judge will reduce the total amount of plaintiff's damages by any percentage of fault you assessed to plaintiff." *See infra* Appendix at A-37-38. The trial judge observed on the record that the note directed him to reduce the total damages assessed by the fault attributed to plaintiff, and entered judgment on March 15, 1988, for $200,000.00.

Some four months later, on July 13, 1988, the court reversed itself by granting plaintiff's motion to amend judgment and entered judgment against FMC Corporation in the amount of $2,000,000.00. On November 8, 1988, the trial judge denied FMC Corporation's motions for reconsideration, to amend the July 13, 1988 judgment, and for a new trial. On January 12, 1990, following briefing and argument by the parties, the Eighth Circuit affirmed the judgment of the district court despite strong dissent. *See infra* Appendix at A-10-32. On February 22, 1990, the Eighth Circuit denied FMC's Petition for Rehearing En Banc and Petition for Rehearing by the Panel.

REASONS FOR GRANTING THE WRIT

I.

The Eighth Circuit Court of Appeals' decision approving the exclusion of evidence, argument and instruction on the effects of federal income tax on plaintiff's lost income stream and on the taxability of a final award is in conflict with a decision of the Seventh Circuit Court of Appeals on the same issues.

With its decision, the Eighth Circuit upheld the trial judge's exclusion of evidence, argument and instruction as to the effects of federal income tax on the lost income element of the jury award and the effects of income taxes on the final award itself. Thus, the decision of the Eighth Circuit is in direct conflict with the Seventh Circuit Court of Appeals' decision in *In re: Air Crash Disaster Near Chicago, Ill.*, 701 F.2d 1189 (7th Cir. 1983), a case that, like the present case, arose under diversity jurisdiction and applied state substantive law. In that case, the Seventh Circuit held it was error to refuse evidence and instruction such as was offered and refused in the instant case. These issues arise in virtually every case in which a loss of future income is claimed as an element of damages and this Court should grant certiorari to resolve the conflict on these key issues. Without a resolution of this conflict by this Court, a defendant in a diversity case within the Seventh Circuit will have its rights adequately protected in regard to these issues, while a similar defendant in a case within the Eighth Circuit will be subject to the possibility of a windfall verdict.

In *Norfolk & Western Ry. Co. v. Liepelt*, 444 U.S. 490 (1980), this Court addressed the question of whether evidence should be received and instruction given as to the effect of income taxes on projected future earnings and as to the nontaxability of an award in a case brought in a state court under the Federal Employers' Liability Act ("F.E.L.A."). After the Illinois Appellate Court had affirmed the refusal of evidence

and instruction on the tax issues, this Court reversed, recognizing that a wage earner's income tax is a "demonstrably relevant factor" in determining lost future income. *Id.* The Court further stated that absent the proper guidance on federal income tax law, "it is entirely possible that the members of the jury may assume that a plaintiff's recovery in a case of this kind will be subject to federal taxation, and that the award should be increased substantially in order to be sure that the injured party is fully compensated." *Id.* at 496. The Court, therefore, held that in an F.E.L.A. action, in which the question of damages is governed by federal law, evidence and instruction on the effect of taxes on projected lost wages and on the non-taxability of the final award should be given. *Id.* at 498.

In *In re: Air Crash Disaster Near Chicago, Ill.*, 701 F.2d 1189 (7th Cir.), *cert. den.*, 464 U.S. 866 (1983), the Seventh Circuit applied this Court's *Liepelt* holding in addressing the questions of whether evidence should be received as to income tax liability on lost earnings and whether instruction should be given as to the non-taxability of an award in a diversity case brought under state substantive law. *Id.* at 1191-92. Although the Seventh Circuit recognized that the state courts had disapproved of such evidence and had directly refused jury instructions on the tax issue, the court held that the refusal of the evidence and instruction constituted reversible error. *Id.* at 1196, 1199.

Regarding the admissibility of evidence concerning the effect of taxes on future lost income, the Seventh Circuit held that the district court was not bound by state evidentiary rules because federal, not state, rules of evidence govern the admissibility of evidence in diversity cases. *Id.* at 1193. Moreover, the court stated that state law on the admissibility of such evidence did not, to the extent it was not a misinterpretation of the Internal Revenue Code, clearly differ from federal law on the issue of damages to be awarded. *Id.* at 1195-97. Thus, the court held that federal evidentiary rules would apply and that it was error to refuse evidence on the tax effects on the projected lost in-

come stream proposed by the plaintiff. *Id.* at 1200. That is directly contrary to the Eighth Circuit's holding in the present case.

The Seventh Circuit also held that the refusal to instruct the jury as to the non-taxability of the award was error despite clear state law approving the refusal of such an instruction in a state court trial. The court recognized that the rationale of the *Liepelt* case should not be limited to F.E.L.A. cases because the taxability of an award under the Internal Revenue Code is uniquely a question of federal tax law. *Id.* at 1199. Thus, the Seventh Circuit held that federal law as set out in *Liepelt* should control the instruction as to the effect of the federal tax code. *Id.* The Seventh Circuit recognized that under both state and federal law a plaintiff is not entitled to receive a bonus beyond compensatory damages. *Id.* at 1200.[2] Because the absence of an instruction as to the federal tax code's effect on an award would invite an inflated award by the jury, the court held that the taxability instruction should have been given despite contrary state procedure. *Id.* at 1200.

In the instant case, the Eighth Circuit Court of Appeals' opinion directly conflicts with the Seventh Circuit's opinion in *In re: Air Crash Disaster.* Counsel for FMC attempted to cross-examine plaintiff's witnesses as to the effect of income taxes on projected lost wages evidence, but the district court sustained objections to such questioning. Counsel was thereafter prevented from arguing the point to the jury in closing argument. FMC was also prohibited from informing the jury that any final award made to plaintiff would not be subject to federal income tax. The Eighth Circuit approved of the rejection of that evidence, argument, and instruction, basing its deci-

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[2] Similarly, Missouri law only permits recovery of "such sum as will fairly and justly compensate plaintiff for any damages [the jurors] believe he sustained and is reasonably certain to sustain in the future." Missouri Approved Instructions 37.03 (1986 New).

sion purely on Missouri law and explicitly rejecting *In re: Air Crash Disaster:*

> [T]his court in *Adams* specifically rejected a Seventh Circuit case [*In re: Air Crash Disaster*] which applied *Liepelt* in a diversity case.

See infra Appendix at A-26 (referring to *Adams v. Fuqua Indus., Inc.*, 820 F.2d 271 (8th Cir. 1987)).

In making its determination that Missouri law prohibits cross-examination regarding the effect of income taxes on a projected lost income stream, the Eighth Circuit relied upon *Dempsey v. Thompson,* 363 Mo. 339, 251 S.W.2d 42 (1952), which the court believed to be the controlling case on the issue. *Dempsey,* however, was a Missouri decision on an F.E.L.A. action decided in 1952 and was subsequently viscerated by the ruling in the 1980 *Liepelt* case, in which this Court recognized that it is now well-settled that issues pertaining to damages in an F.E.L.A. case, including the propriety of cross-examination on the effect of income taxes, are to be decided under federal, not state, law. *Liepelt,* 444 U.S. at 493.

Additionally, *Dempsey,* the sole case relied upon by the Eighth Circuit regarding this issue, was ignored by the Missouri Supreme Court in its most recent opinion discussing cross-examination in regard to the effect of income taxes on a lost wages projection. In *Nesselrode v. Executive Beechcraft, Inc.,* 707 S.W.2d 371 (Mo. 1986), the Missouri Supreme Court referred to evidence introduced "through cross-examination that decedent's projected stream of lost-income does not take into consideration his income tax obligations," without any suggestion of impropriety and without any citation to the *Dempsey* opinion. *Id.* at 388. Thus, the most recent statement by the Missouri Supreme Court made after *Liepelt* does not disapprove of such evidence. The Eighth Circuit, in its opinion, conceded that Missouri law on this issue is less than "clear" and is "somewhat clouded," but refused to apply federal law on this

issue and approved the exclusion of the evidence held admissible by the Seventh Circuit in *In re: Air Crash Disaster.*

Regarding the refusal to permit argument and instruction on the taxability of the award at issue, the Eighth Circuit merely pointed to Missouri cases and the Missouri Approved Instructions, which do not require an instruction on non-taxability of awards. On the other hand, the Seventh Circuit in *In re: Air Crash Disaster* held the refusal of an instruction on this issue to be erroneous *despite* the fact that the Illinois state courts had expressly refused instruction on the taxability of awards in state cases. This holding is in direct conflict with that of the Eighth Circuit in the instant case. Indeed, the Eighth Circuit acknowledged that it was rejecting the holding of the *In re: Air Crash Disaster* court.

When the decisions of two circuit courts of appeals are in conflict such as in the case at bar, certiorari should be granted to resolve the conflict. *See, e.g., McElroy v. United States,* 455 U.S. 642, 643 (1982); *Firestone Tire & Rubber Co. v. Risjord,* 449 U.S. 368, 373 (1981). This is particularly true on issues such as these where the effect of taxes on lost wages and the taxability of awards pursuant to the federal Internal Revenue Code is a key issue in virtually every personal injury action. This Court should grant certiorari to resolve this split of authority that will subject certain defendants to the possibility of windfall judgments in conflict with the purposes behind compensatory damage awards under both federal and state law. Lower courts need guidance from this Court as to whether parties are entitled to introduce evidence and submit jury instructions regarding the effects of federal income tax on lost wages and on final awards.

II.

The Eighth Circuit majority's decision pertaining to the verdict form departed from the accepted and usual course of judicial proceedings so as to call for an exercise of this Court's power of supervision.

The Eighth Circuit, in its 2-1 decision and despite the strong dissent of the Honorable Judge Henley, affirmed the district court's judgment despite the majority's own "reservations about the verdict form" at issue, a verdict form that the majority labeled variously as "misleading," "confusing," "unclear," and "ambiguous." *See infra* Appendix at A-16-19. The majority went so far as to recommend that the verdict form not be used in future cases in the Eighth Circuit, while permitting its use against FMC in this case. *Id.* at A-17 (footnote 2). In other words, the majority, by its recommendation, effectively admitted that the verdict form was improper, yet was willing to permit it to be used in this case so long as it was never used again.

The Eighth Circuit's recommendation that this verdict form not be used again does not mean that FMC is the only party affected by the majority's one-time approval of this admittedly improper form. Rather, the majority's attitude toward its role of supervising accuracy and fairness in district courts represents a far more serious threat to the integrity of the system itself. The Eighth Circuit's abdication of its role as the district court's guiding hand on the propriety of instructions virtually invites the district courts to dispense with careful scrutiny of form instructions for the purpose of eliminating "misleading", "confusing," "unclear," or "ambiguous" language.

This Court and the appellate courts have traditionally exercised great vigilance to correct and eliminate defective jury instructions and forms. If the view of the Eighth Circuit remains unchallenged, errors in jury instructions no longer need be corrected on appellate review. Instead, they can be dealt with through prospective "recommendations." Indeed, there is no

reason to believe that such "recommendations" will be limited to questions involving jury instructions; similar advice pertaining to procedural and evidentiary issues, for example, is easily envisioned. It is precisely this type of departure (along with its ominous portents) from the accepted and usual course of judicial proceedings that requires the supervisory power of this Court.

It is a longstanding rule in this Court that instructions must be couched in language of such definite and legal interpretation as to not mislead either the court or the jury as to its precise meaning; misleading instructions are grounds for reversal. *See, e.g., Jones v. Randolph,* 14 Otto 108, 26 L.Ed. 671, 672 (1881) ("we cannot but think this charge was misleading. . . . this leads to a reversal of the judgment"); *see also Winn v. Patterson,* 9 Pet. 663, 9 L.Ed. 266, 272 (1835) (confirming that ambiguous and general instructions "ought not to have been given"). This rule has traditionally been followed in the circuit courts, where it has been held that jury instructions must ensure that the jury understands the issues in the case and is not misled in any way. *See e.g., Ragsdell v. Southern Pac. Transp. Co.,* 688 F.2d 1281, 1982 (9th Cir. 1982); *Wright v. Wagner,* 641 F.2d 239, 242 n. 4 (5th Cir. 1981). The majority's decision even departs from the jury instruction standards announced by the Eighth Circuit in past decisions. *See, e.g., Monahan v. Flannery,* 755 F. 678, 681 (8th Cir. 1985) (reversal required where instructions did not fairly and correctly set forth the law); *Slater v. K.F.C. Corp.,* 621 F.2d 932, 937-38 (8th Cir. 1980) (failure to properly instruct requires new trial). The decision is a major retreat from the accepted role of appellate courts to supervise the decisions of the trial courts and is a departure from the accepted and usual course of judicial proceedings to such a vast extent as to call for the exercise of this Court's power of supervision as contemplated by Supreme Court Rule 17.

The function of a reviewing court with respect to jury instructions is to satisfy itself that the instructions show no tendency to confuse or mislead the jury with respect to applicable principles

of law. *See, e.g., Rohner, Gehrig & Co. v. Capital City Bank,* 655 F.2d 571, 580 (5th Cir. 1981). From the Eighth Circuit's own opinion, surely it cannot be said that the verdict form at issue had no tendency to confuse or mislead the jury or that the jury may not have been misled in any way. The jury was instructed that the judge would reduce the total amount of damages by any percentage of fault assessed to the plaintiff. This was not done. The Eighth Circuit's decision, refusing to reverse the judgment but prospectively prohibiting use of the misleading instruction at issue, requires this Court's supervision.

CONCLUSION

The Eighth Circuit majority's opinion in this case directly conflicts with the decision of another federal appellate court on the federal income tax questions. Moreover, the majority's departure from the accepted and usual review of jury instructions and its approval of an instruction it admitted was misleading are precisely the type of ills to which Supreme Court Rule 17 speaks. The Eighth Circuit has created a confusing precedent, likely to generate even further confusion among the other circuits as well as within the Eighth Circuit. Plenary consideration of these matters by this Court is essential.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 87-1155C (6)

Todd Gander,
Plaintiff,

vs.

FMC Corporation,
Defendant.

JUDGMENT

(Filed March 15, 1988)

This action came on for trial before the Court and a jury, Honorable George F. Gunn, Jr., District Judge, presiding, and the issues having been duly tried and the jury having rendered its verdict;

It is HEREBY ORDERED, ADJUDGED and DECREED that the plaintiff, Todd Gander, recover of the defendant, FMC Corporation, the sum of Two Hundred Thousand ($200,000.00) dollars with interest thereon at the rate of 6.71% per annum and costs.

/s/ George F. Gunn, Jr.
United States District Judge

Dated at St. Louis, Missouri
this 15th day of March, 1988.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 87-1155C(6)

Todd Gander,
Plaintiff,

vs.

FMC Corporation,
Defendant.

MEMORANDUM AND ORDER

(Filed July 13, 1988)

This matter is before the Court on plaintiff's motion to amend judgment and for new trial.

In this products liability action plaintiff Todd Gander seeks recovery for personal injuries sustained in February 1985 when his right arm was severed below the elbow when it came into contact with a conveyor belt and drive drum. Plaintiff asserted claims of strict liability and negligence against defendant FMC Corporation, the manufacturer of the conveyor belt. The case was submitted to the jury on both theories. The jury returned a verdict on the appended form, M.A.I. 35.15. M.A.I. 35.15 is the verdict form approved by the Missouri Supreme Court for the submission of strict liability and negligence where comparative fault is applicable only to the negligence theory in accordance with the decision in *Lippard v. Houdaille Ind.*, 715 S.W.2d 491 (Mo. banc 1986). The jury found in favor of plaintiff on Part I. In Part II the jury assesed 90% fault against the plaintiff and 10% against the defendant. In Part III the jury assessed plaintiff's damages at $2,000,000. On the basis of this

verdict the Court then entered a judgment for plaintiff in the amount of Two Hundred Thousand Dollars ($200,000).

Plaintiff moves pursuant to Fed.R.Civ.P. 59(e) to amend the previously entered judgment to provide that plaintiff shall recover Two Million Dollars ($2,000,000). Plaintiff contends that the Court's judgment fails to give the proper legal effect to the jury's findings as reflected in the verdict form. Upon reconsideration the Court is inclined to agree. Inasmuch as this is a case in which comparative negligence principles apply only to the jury's determination on the negligence claim and not to the strict liability claim, the jury's findings as reflected on the verdict form entitle plaintiff to a judgment in the amount of Two Million Dollars ($2,000,000). Moreover, there is no inconsistency in the jury's findings inasmuch as the strict liability finding addresses plaintiff's right to recover for injury based on product defect while the negligence finding addresses plaintiff's right to recovery based on defendant's conduct. Accordingly,

IT IS HEREBY ORDERED that the Court's previously entered judgment shall be and it is amended to properly reflect the legal effect of the jury's findings which entitle plaintiff to recover a judgment in the amount of Two Million Dollars ($2,000,000) on his claims.

IT IS FURTHER ORDERED that the judgment previously entered in this cause shall be and it is null, void and of no effect and that the judgment entered this day shall be and it is the sole and final judgment of the Court in this cause.

Inasmuch as plaintiff only seeks a new trial in the event that the Court denies plaintiff's motion to amend the judgment,

IT IS FURTHER ORDERED that plaintiff's motion for a new trial be and it is denied as moot.

Dated this 13th day of July, 1988.

/s/ George F. Gunn, Jr.
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No: 87-1155C(6)

Todd Gander,
Plaintiff,

vs.

FMC Corporation,
Defendant.

JUDGMENT

(Filed July 13, 1988)

This action came before the Court and jury with the parties having appeared in person and by their respective attorneys. The issues were duly tried and the jury rendered its verdict on March 15, 1988.

WHEREAS, on the claim of plaintiff, Todd Gander, for personal injuries based on the theory of strict liability/product defect against defendant FMC Corporation, the jury returned a verdict in favor of plaintiff, Todd Gander.

WHEREAS, on the claim of plaintiff, Todd Gander, for personal injuries based on the theory of negligence, the jury assessed percentages of fault as follows: to defendant FMC Corporation - 10%; to plaintiff Todd Gander - 90%.

WHEREAS, the jury further found the total damages of plaintiff, Todd Gander, to be TWO MILLION DOLLARS ($2,000,000.00).

WHEREFORE, it is hereby ORDER, ADJUDGED, and DECREED on plaintiff's claim for personal injury based on the theory of strict liability/product defect, that the plaintiff, Todd Gander, have and recover from defendant, FMC Corporation,

the sum of TWO MILLION DOLLARS ($2,000,000.00), together with court costs.

WHEREFORE, it is hereby further ORDERED, ADJUDGED and DECREED that plaintiff, Todd Gander, on his claim for personal injuries based on the theory of negligence, have and recover from defendant FMC Corporation, the sum of TWO HUNDRED THOUSAND DOLLARS ($200,000.00), together with court costs.

It is further ORDERED that the amount of damages recoverable under that portion of this JUDGMENT based on the negligence theory shall not be in addition to the amount of damages recoverable under that portion of this JUDGMENT based on the theory of strict liability/product defect.

SO ORDERED:

/s/ George F. Gunn, Jr.
District Judge

DATE: 7/13/88

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 87-1155C(6)

Todd Gander,
Plaintiff,

vs.

FMC Corporation,
Defendant,

VERDICT

PART I

NOTE: Complete this form as required by your verdict.

On the claim of plaintiff Todd Gander for personal injury based on the theory of strict liability against defendant FMC/Link-Belt Corporation, we, the jury, find in favor of:

Plaintiff Todd Gander or Defendant FMC/Link-Belt

PART II

NOTE: Complete the following by filling in the blanks as required by your verdict on the claim of plaintiff for personal injury based on the claim of negligence whether or not you found in favor of plaintiff on his claim for personal injury based on product defect. If you assess a percentage of fault to any of those listed below, write in a percentage not greater than 100%. Otherwise, write in "zero" next to that name. If you assess a percentage of fault to any of those listed below, the total of such percentages must be 100%.

On the claim of plaintiff for personal injury based on negligence, we, the jury, assess percentages of fault as follows:

Defendant FMC/Link-Belt	10%	(zero to 100%)
Plaintiff Todd Gander	90%	(zero to 100%)
Total	100%	(zero OR 100%)

PART III

NOTE: Complete the following paragraph if you find in favor of plaintiff on his claim for personal injury based on product defect or if you assessed a percentage of fault to any defendant on plaintiff's claim for personal injury based on negligence.

We, the jury, find the total amount of plaintiff's damages disregarding any fault on the part of plaintiff to be

$2,000,000.00/Two Million Dollars
(stating the amount)

Dated this 15th day of March, 1988.

(Original signed by foreperson)
Foreperson

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 87-1155C(6)

Todd Gander,
Plaintiff,
vs.
FMC Corporation,
Defendant.

ORDER

(Filed Nov. 8, 1988)

IT IS HEREBY ORDERED that defendant FMC Corporation's motion for reconsideration and to amend this Court's judgment of July 13, 1988 be and it is denied.

IT IS FURTHER ORDERED that defendant FMC Corporation's motion for a new trial be and it is denied.

Dated this 8th day of November, 1988.

/s/ George F. Gunn, Jr.
United States District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 88-2823EM

Todd Gander,
Appellee,

v.

FMC Corporation,
Appellant.

Appeal from the United States
District Court for the
Eastern District of Missouri.

JUDGMENT

(Filed March 6, 1990)

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is ordered and adjudged that the judgment of the district court in this cause is affirmed in accordance with the opinion of this Court.

January 12, 1990

A true copy.

ATTEST:

/s/ Robert D. St. Vrain
Clerk, U.S. Court of appeals, Eighth Circuit

Mandate Issued, 3/2/90

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 88-2823

Todd Gander,
Appellee,

v.

FMC Corporation,
Appellant.

Appeal from the United States
District Court for the Eastern
District of Missouri.

Submitted: September 13, 1989

Filed: January 12, 1990

Before ARNOLD, Circuit Judge, HENLEY, Senior Circuit Judge, and BEAM, Circuit Judge.

BEAM, Circuit Judge.

FMC Corporation appeals a judgment in favor of Todd Gander for $2,000,000, entered on July 13, 1988, following a jury trial. Gander's theories of recovery for personal injuries sounded in both strict liability in tort and negligence, and the jury found in favor of Gander on both claims. The jury also assessed Gander's comparative fault on the negligence claim at

II. DISCUSSION

A. The Verdict Form

FMC argues on appeal that the district court erred both in submitting to the jury Gander's verdict form, which it argues was confusing and inaccurate, and in amending judgment. While the arguments are closely related and both ultimately turn on whether the verdict form correctly stated Missouri law, we treat the arguments separately.

The verdict form was submitted by Gander, and was taken from the Missouri Approved Jury Instructions. MAI 35.15 illustration (3d ed. Supp. 1989) (the form is indicated as Verdict A, and is taken from MAI 36.01 and 37.07). The form used is approved, at least as an illustration, by the Missouri Supreme Court for the submission of both strict liability and negligence claims, and was new at the time of trial. Brief for Appellant at 9. It contains three parts,[1] the first dealing with the strict liabili-

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[1] Beginning with Part I, the verdict form reads as follows:

NOTE: Complete this form as required by your verdict.

On the claim of plaintiff Todd Gander for personal injury based on the theory of strict liability against defendant FMC/Link-Belt Corporation, we, the jury, find in favor of: _____

* * *

PART II

NOTE: Complete the following by filling in the blanks as required by your verdict on the claim of plaintiff for personal injury based on the claim of negligence whether or not you found in favor of plaintiff on his claim for personal injury based on product defect. If you assess a percentage of fault to any of those listed below, write in a percentage not greater than 100%. Otherwise, write in "zero" next to that name. If you assess a percentage of fault to any of those listed below, the total of such percentages must be 100%.

On the claim of plaintiff for personal injury based on negligence, we, the jury, assess percentages of fault as follows:

* * *

ty claim, the second with comparative fault on the negligence claim, and the third with total damages. The difficulty the district court had, and the arguable error in the form, stems from the closing note, which explains the reduction in damages for plaintiff's comparative fault on the negligence claim.

After the jury had been dismissed, FMC remarked that the verdict appeared to be $200,000; i.e., $2,000,000 total damages reduced by the 90% fault assessed to Gander. Trial Transcript, vol. 3, at 270. Gander argued that the verdict was for $2,000,000, since the jury found for Gander on the strict liability claim, which could not be reduced by Gander's comparative fault. *Id.* at 272. The district court replied: "Not based on the note on part three." *Id.* After quoting the note, the court continued: "This is directing me to reduce that by 90 percent." *Id.* at 274. The district court then entered judgment for $200,000.

> NOTE: If you assessed a percentage of fault to any defendant on plaintiff's claim for personal injury based on negligence, the judge will reduce the total amount of plaintiff's damages by any percentage of fault you assess to plaintiff.

PART III

NOTE: Complete the following paragraph if you find in favor of plaintiff on his claim for personal injury based on product defect or if you assessed a percentage of fault to any defendant on plaintiff's claim for personal injury based on negligence.

We, the jury, find the total amount of plaintiff's damages disregarding any fault on the part of plaintiff to be _____

• • •

NOTE: If you assessed a percentage of fault to any defendant on plaintiff's claim for personal injury based on negligence, the judge will reduce the total amount of plaintiff's damages by any percentage of fault you assess to plaintiff.

Upon Gander's motion to amend, however, the district court decided that it had improperly reduced the total damages by the percentage of comparative fault assessed to Gander. "Inasmuch as this is a case in which comparative negligence principles apply only to the jury's determination on the negligence claim and not to the strict liability claim, the jury's findings as reflected on the verdict form entitle plaintiff to a judgment in the amount of Two Million Dollars ($2,000,000)." Memorandum and Order, No. 87-1155C(6), July 13, 1988, at 2.

To the extent that FMC argues that the district court erred in amending its judgment, we disagree. "The decision to grant or deny a Rule 59 motion is committed to the sound discretion of the trial court." *A. W. v. Northwest R-1 School Dist.*, 813 F.2d 158, 165 (8th Cir.), *cert. denied*, 484 U.S. 847 (1987); *Slater v. KFC Corp.*, 621 F.2d 932, 939 (8th Cir. 1980). Under Missouri law, which we are bound to apply in this diversity case, *see Walker v. Paccar, Inc.*, 802 F.2d 1053, 1055 (8th Cir. 1986), the district court was correct in amending the judgment. Missouri law is clear that a verdict resting on a strict liability claim cannot be reduced by a plaintiff's comparative fault. In *Lippard v. Houdaille Indus.*, 715 S.W.2d 491 (Mo. 1986), the Missouri Supreme Court held that "the plaintiff's contributory negligence is not at issue in a products liability case." *Id.* at 493. The court explained that negligence on the part of plaintiff should neither prohibit nor reduce plaintiff's recovery on a strict liability claim. "We adhere to the view that distributors of 'defective products unreasonably dangerous' should pay damages for injuries caused by the products, without reduction because a plaintiff may have been guilty of a degree of carelessness." *Id.* at 494. As defense counsel admitted at oral argument, the judgment of $200,000 under the strict liability theory was clearly incorrect as a matter of Missouri law. Therefore, we find no abuse of discretion by the district court.

This does not, however, end the matter. FMC's argument is better stated in terms of the verdict form's correctness. That is,

the fact that the amended judgment properly reflected Missouri law does not mean that the verdict form itself did not misstate Missouri law or unduly confuse the jury. Thus, FMC argues that the form was incorrect as a matter of law, or, in the alternative, that it was so confusing that the intent of the jury is unclear. The jury may, indeed, have been misled by the closing note, which could be read (as first read by the district court) to apply comparative fault to the strict liability claim as well as to the negligence claim. On its face, the note is not specifically limited to one negligence claim. Nor does the note specifically apply to the strict liability claim. Because of this ambiguity, the jury, according to FMC, may have been led to conclude that total damages would be reduced by any percentage of fault assessed to Gander, even though it found in Gander's favor on the strict liability claim. Hence, FMC argues, the jury probably intended that Gander receive only $200,000, and thus assessed total damages of $2,000,000 because it thought that total damages would be reduced by 90%. We must, therefore, consider whether the verdict form is legally incorrect or unduly misleading.

While it is a close question, we do not think that the verdict form misstates Missouri law. FMC agreed at oral argument that the difficulty with the form stems from the closing note, which, as indicated, can be read to require a reduction, based on plaintiff's comparative fault on the negligence claim, in the strict liability claim. Although the note leaves open this possibility, it does not, as the district court initially thought, *require* it. Because of its grammatical structure and location, the note is somewhat misleading. The note can be read to indicate a connection between a finding of contributory fault on the negligence claim and a reduction in total damages. *If* the jury assesses a percentage of fault to any defendant, *then* "the judge *will reduce*" total damages accordingly. The reduction in damages thus can be caused by the jury assessing fault, regardless of any finding on the strict liability claim. While this is a possible reading of the note, it is not a required reading.

However, as a matter of law, the note is not incorrect; it is simply unclear. Given that Missouri law is clear that the judge cannot apply comparative negligence principles to the strict liability claim, the strict liability claim will, in fact, be unaffected by any percentage of fault assessed to plaintiff on the negligence claim. The note does not require otherwise, and thus is not legally incorrect. It does not misstate Missouri law.

The verdict form is, however, at least potentially confusing to the jury.[2] We must, therefore, consider whether the form, taken together with the instructions to the jury, is so misleading or confusing that the jury verdict cannot stand. In determining whether the verdict form is confusing, we must consider it in light of the instruction given. *See United States v. Hines,* 728 F.2d 421, 427 (10th Cir.), *cert. denied,* 467 U.S. 1246 (1984). It is enough if the "charge as a whole . . . state[s] the governing law fairly; technical imperfections or a lack of absolute clarity will not render the instructions erroneous." *Toro Co. v. R & R Products Co.,* 787 F.2d 1208, 1215 (8th Cir. 1986). We find that the jury was correctly and adequately instructed on Missouri law, and, therefore, that the verdict form, not clearly wrong, also is not so confusing that the jury verdict must be upset.

The important inquiry is whether the jury was properly instructed that damages were to be calculated regardless of any fault assessed to plaintiff on the negligence claim. Initially, we note that the verdict form itself is clear and correct on this mat-

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[2] Although we hold that the verdict form is technically correct, and that we cannot set aside the jury verdict in this case, we recommend that the form not be used by the federal district courts of this circuit as presently written. The form could be substantially clarified by simply eliminating the concluding note, which FMC agreed at oral argument is the main problem with the form. MAI 37.03 as written in the MAI 35.15 illustration clearly and correctly instructs the jury on the same matters which the concluding note attempts to cover. The note is, therefore, unnecessary. If a note is deemed to be required, several alternative versions that clarify the problem readily come to mind.

ter. In Part III, in which the jury finds total damages, the form states: "We, the jury, find the total amount of plaintiff's damages *disregarding any fault on the part of plaintiff* to be ____" (emphasis added). This instruction that comparative fault is *not* to be considered in calculating total damages is much clearer than is any inference from the concluding note that might lead the jury to inflate total damages in anticipation of a reduction for plaintiff's comparative fault on the negligence claim. Instruction number 18 further provided that, if the jury found in favor of Gander on the strict liability claim, or assessed a percentage of fault to FMC on the negligence claim, then

> disregarding any fault on the part of plaintiff, you must determine the total amount of his damages to be such sum as will fairly and justly compensate him for any damages you believe he sustained and is reasonably certain to sustain in the future as a direct result of the occurrence mentioned in the evidence.

Moreover, the jury was specifically instructed, through instruction number 18, that it should calculate total damages regardless of plaintiff's fault. "In determining the total amount of plaintiff's damages, you must not reduce such damages by any percentage of fault you may assess to plaintiff." Instruction number 18, *see also* MAI 37.03 (3d ed. 1989 Supp.). Thus, the district court correctly instructed the jury that its function was not to determine the amount of plaintiff's recovery, but to determine the amount of plaintiff's total damages. Any efforts by the jury to calculate damages in terms of plaintiff's recovery would be contrary to the court's instructions.

Not only was the jury properly instructed on its role in calculating damages, but the district court also properly instructed the jury that comparative fault principles do not apply to strict liability claims. Instruction number 18 provided that: "The judge will compute any recovery *on plaintiff's claim for personal injury based on negligence* by reducing the amount you find as plaintiff's total damages by any percentage of fault you

assess to plaintiff." Instruction number 18, *see also* MAI 35.15 illustration (3d ed. Supp. 1989) (emphasis added).[3] Thus, while the verdict form may be unclear about whether its concluding note applies to the strict liability claim, the instructions were quite clear that the jury finding on comparative fault does not so apply. As a whole, the instructions correctly and specifically instructed the jury about the ambiguities the form may have created. Given this correct and explicit instruction, it is mere speculation that the jury calculated total damages at $2,000,000 in anticipation of a reduction for plaintiff's comparative fault on the negligence claim.

Moreover, mere speculation that a jury verdict may have been based on the jury's own misunderstanding of the law, even though properly instructed, is an insufficient basis on which to upset a jury verdict. "It is well settled that a jury's misunderstanding of testimony, misapprehension of law, errors in computation or improper methods of computation, unsound reasoning or other improper motives cannot be used to impeach a verdict." *Chicago, Rock Island & Pacific R.R. v. Speth,* 404 F.2d 291, 295 (8th Cir. 1968). In *Speth,* the jury assessed plaintiff's contributory negligence at 40% and awarded $16,000 in damages. The district court, *sua sponte,* asked the jury whether its damage award was net or gross. The jury responded that its calculation was a net figure, compensating for plaintiff's contributory negligence. The jury thus intended for plaintiff to recover $16,000. When the district court sent the jury back to recalculate damages,it returned with a figure of $40,000. On appeal, this court reversed and remanded for a new trial on the issue of damages. *Id.* at 296. This is not to say, however, that when a jury verdict "on its face shows a clear disregard for the

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[3] MAI 37.03, from which the illustration is drawn, differs materially from the illustration and from the instruction given at trial. MAI 37.03 does not discuss alternate theories of liability submitted to the jury, and thus the specific reference to Gander's claim based on negligence, emphasized in the text above, varies from MAI 37.03.

court's instructions," *id.* at 295, it cannot be corrected. But given correct instruction on the law and no clear disregard for that instruction on the face of the verdict, a jury verdict must remain immune from questioning by the district court and from speculation by an appellate court that the verdict may be based on a misunderstanding of the law. Whether the jury misunderstood a correct instruction of the law is an improper subject for mere speculation. *See* 6A J. Moore, *Moore's Federal Practice* ¶ 59.08[4], at 59-115 to 116 (1989) ("a verdict cannot be upset by speculation"); *id.* at 59-127 ("A mere suspicion, however, that the jury has not followed the court's instructions is not sufficient, since that would make the verdict too valnerable and would needlessly prolong litigation."); *Peveto v. Sears, Roebuck & Co.*, 807 F.2d 486, 490 (5th Cir. 1987) ("Whether or not the jury misunderstood the charge of the court is not a question to be reexamined after the verdict has been rendered.") (citation omitted).

Our holding finds support as well in the cases which, based on Federal Rule of Evidence 606(b), forbid improper impeachment of a jury verdict. While no improper impeachment occurred in this case, Rule 606(b) establishes that it would have been improper to inquire of the jurors what they really intended by their verdict. In *Karl v. Burlington Northern Ry. Co.*, 880 F.2d 68 (8th Cir. 1989), the jury returned a verdict in a personal injury action in favor of plaintiff. *Id.* at 69. The jury found plaintiff to be 75% at fault, *id.* at 70 n.3, and assessed damages at $273,750. The jury was instructed to assess damages "without taking into consideration any reduction of the plaintiff's claim due to her own negligence." *Id.* at 70 n.4. The district court, however, called the jury foreman at the request of plaintiff's counsel, to determine whether the jury calculated damages without regard for plaintiff's contributory negligence. *Id.* at 71. The jury foreman explained that $273,750 was 25% of what plaintiff asked for, and was what the jury intended plaintiff to recover. *Id.* The district court then amended judgment to reflect actual damages of $1,095,000. *Id.* at 72.

Thus, given the substantial evidence supporting the jury's calculation of damages at $2,000,000, the correct instruction of the law, and mere speculation that the jury may have intended to award Gander only $200,000, we cannot set aside the jury verdict on the ground that the verdict form was unclear.

B. Income Taxes

FMC next argues that the district court erred in not permitting cross-examination of Gander's witnesses about the effect of income taxes on Gander's lost income. FMC first attempted to cross-examine Viscusi, the economist who testified about Gander's lost wages. FMC asked Viscusi whether the figures he was using were in terms of gross income. Counsel then asked whether Gander would actually get those gross dollars, to which Gander objected. Trial Transcript, vol. 1, at 340-41. At the bench, Gander said that under Missouri law, income tax assessments were inappropriate subjects for cross-examination, and that any contrary holdings from FELA cases could not apply in this diversity case. *Id.* at 342. FMC suggested that it should be able to cross-examine the economist, but when asked by the court whether the law was clear that such cross-examination was permissible, FMC counsel responded: "I think I can." *Id.* at 343. The district court allowed FMC to cross-examine on income taxes, but also said that it would grant a mistrial if Gander were able to show that such cross-examination was improper. *Id.* at 344. FMC made no further efforts to cross-examine Viscusi about income taxes.

The second exchange over income taxes occurred at the bench, when FMC presented to the court *Nesselrode v. Executive Beachcraft, Inc.*, 707 S.W.2d 371 (Mo. 1986), which FMC said permitted cross-examination on income taxes. Trial Transcript, vol. 2, at 2-3. The district court noted, however, that *Nesselrode* made the law no clearer, and thus adhered to its original ruling. *Id.* at 4.

FMC then attempted to cross-examine Crawford, Gander's witness from the union. Counsel asked Crawford, who testified

about wages earned by coal conveyor operators at Anheuser-Busch, whether his figures were net or gross. Gander objected on the basis of the previous discussions, and this time the objection was explicitly sustained. *Id.* at 70-71.[5]

Finally, FMC tendered an instruction on reduction to present value, which it then linked to the issue of whether the total award was subject to income taxation. *Id.* vol. 3, at 214-15. Gander objected to the instruction and the court agreed, thus precluding FMC from arguing the taxability of the award to the jury. *Id.* at 215.[6] It is somewhat unclear from the objections and the discussions at trial whether FMC appeals from the district court's rulings on cross-examination or from the district court's refusal to instruct the jury that the judgment was not subject to income taxation. In either case, however, Missouri law is clear that the trial court did not err in its rulings.

We must first consider the appropriate governing law, for FMC argues in its brief that these issues are controlled by *Norfolk & Western Ry. v. Liepelt,* 444 U.S. 490 (1980) and *Jones & Laughlin Steel Corp. v. Pfeifer,* 462 U.S. 523 (1983). In *Liepelt,* and FELA action, the Supreme Court considered whether the

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[5] While the district court's initial ruling on Gander's first objection to FMC's cross-examination was to conditionally allow it subject to the same sort of cross-examination. Thus, while Gander argued at oral argument that FMC could not appeal from the district court's ruling in its favor, we think that FMC's claim that it was effectively prohibited from undertaking its proposed cross-examination is essentially accurate.

[6] It is clear that the prior discussions related only to cross-examination about the effects of income taxes on Gander's lost income. With reference to the present value instruction and proposed argument on income taxes, however, FMC makes reference to Gander's income tax liability on the judgment, a different matter. Trial Transcript, vol. 3, at 215. FMC may have been concerned that the jury would inflate the judgment to compensate for income taxes if it were not informed that the judgment is not subject to income tax.

jury should receive both evidence of the effect of income taxes on lost wages and an instruction on the taxability of a final award. As to the effects of taxes on a lost income stream, the Supreme Court held that such evidence was neither too speculative nor complex for a modern jury to understand, and thus was proper to establish after-tax earnings. *Liepelt,* 444 U.S. at 494. The Supreme Court also held that it was error to refuse to give an instruction that the final award was not subject to income tax. *Id.* at 498.[7] FMC argues that these cases establish that the district court erred in its rulings.[8]

These cases, however, are not controlling. We have specifically held, in *Adams v. Fuqua Indus.,* 820 F.2d 271 (8th Cir. 1987), that *Liepelt* does not control in non-FELA cases. In *Adams,* appellant argued that the rationale of *Liepelt* transcends the FELA context and that it should, therefore, apply in diversity actions. *Id.* at 276. This court rejected the argument, and, in considering an instruction on the taxability of an award, held that: "Whether to give or withhold a taxability instruction is a question of state law, which we are bound to follow." *Id.* at 277. More generally, the law is perfectly clear that "when a tort action is brought in federal court pursuant to diversity jurisdiction, basing liability on state law, the court must apply state law in regard to availability and computation of damages." *Id.* (quoting *Losey v. North American Philips Consumer Electronics Corp.,* 792 F.2d 58, 61-62 (6th Cir.

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[7] The Supreme Court relied in part on the Missouri case, *Dempsey v. Thompson,* 363 Mo. 339, 251 S.W.2d 42 (1952). The approved instruction was as follows: "Your award will not be subject to any income taxes, and you should not consider such taxes in fixing the amount of your award." *Liepelt,* 444 U.S. at 492.

[8] *Jones & Laughlin* essentially follows *Liepelt,* and holds that in calculating a lost income stream, income tax evidence is appropriate. "Since the damages award is tax-free, the relevant stream is ideally of *after-tax* wages and benefits." *Jones & Laughlin,* 462 U.S. at 534.

1986)). Moreover, this court in *Adams* specifically rejected a Seventh Circuit case[9] which applied *Liepelt* in a diversity case. We defer instead to "Missouri's right to create its own law free from federal interference." *Adams,* 820 F.2d at 278. Thus, we apply Missouri law.

Missouri law is clear that it is not error for a court to refuse to give an instruction that an award is not subject to income taxation. At one time, Missouri law favored such an instruction. In *Dempsey v. Thompson,* 363 Mo. 339, 251 S.W.2d 42 (1952), an FELA case, defendant argued error in the court's refusal to give an instruction that no income tax would be assessed on the judgment. *Id.* at 43-44. The Missouri Supreme Court agreed, finding no reason not to give the instruction, especially given the danger that the jury could incorrectly overcompensate for taxes on the judgment. It was, therefore, error to refuse the instruction. *Id.* at 45. More recent Missouri cases, however, establish that *Dempsey* has been superseded by Missouri Approved Jury Instructions (MAI) outside of the FELA context, and that it is not error to refuse such an instruction.

The Missouri Court of Appeals reviewed several decisions on this issue in *Tennis v. General Motors Corp.,* 625 S.W.2d 218 (Mo. Ct. App. 1981). Noting that *Dempsey* was an FELA case and was decided before the Missouri Approved Jury Instructions were approved by the Missouri Supreme Court, the court explained its ruling in *Senter v. Ferguson,* 486 S.W.2d 644 (Mo. Ct. App. 1972),in which the court held that it was error to give the same instruction given in *Dempsey.* In *Tennis,* the court explained that *Senter* was a post-MAI case, and that MAI 4.01, not *Dempsey,* controlled the instruction issue in a non-FELA case. MAI 4.01, the only permissible and authorized damage instruction in a non-FELA case, explicitly did not incorporate the *Dempsey* FELA instruction. Thus, to give the instruction

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[9] *In re Air Crash Disaster,* 701 F.2d 1189 (7th Cir.), *cert. denied,* 464 U.S. 866 (1983).

would be error, since the instruction is "clearly an addition to or 'modification' of MAI 4.01." *Tennis,* 625 S.W.2d at 226. Moreover, the second edition of MAI did not include the *Dempsey* instruction even in its damage instructions for FELA cases, MAI 8.01 and 8.02. Following the Supreme Court decision in *Liepelt,* however, both FELA instructions were modified in the third edition to contain the charge that " 'any award you may make is not subject to income tax.' " *Id.* at 227. "It seems worthy of note that although FELA instructions MAI 8.01 and 8.02 were changed in the 3rd Edition of MAI in compliance with *Norfolk,* MAI [4.01] has not been altered nor amended to include a direction that any awarded damages are 'not subject to income tax.' " *Id.* Thus, in *Tennis,* the Missouri Court of Appeals found no error in the lower court's refusal to give the instruction in a non-FELA case.

Again, in *Kenton v. Hyatt Hotels Corp.,* 693 S.W.2d 83 (Mo. 1985), appellant argued error in the court's refusal to give a similar instruction. *Id.* at 96. The Missouri Supreme Court reviewed the law, and affirmed the lower court. "The trial court here cannot be convicted of error, requiring a new trial, in following the established law of this state." *Id.* at 96.

Thus, to the extent that FMC presented the court with an instruction that the judgment would not be subject to income taxation, we find no error in the district court's refusal to give such an instruction.

Missouri law is somewhat less clear, however, regarding the admissibility of evidence relating to the effects of income tax on a lost-income stream. The controlling case appears to be *Dempsey.* In *Dempsey,* defendant argued on appeal that the trial court had erred in refusing to permit defendant to cross-examine plaintiff's witness about the effects of income tax on a personal injury award. *Dempsey,* 251 S.W.2d at 43. The Missouri Supreme Court held that:

> The trial court did not err either in refusing to permit defendant to cross-examine plaintiff's actuarial witness

> relative to income tax liability or in refusing to permit defendant to argue to the jury that in arriving at the amount of its award it should consider only the amount of future earnings lost to plaintiff after deduction of income taxes for which he would have been liable had he continued his employment without injury.

Id. at 45. While it is unclear as to whether FMC's attempted cross-examination concerned Gander's tax liability on the award or the effects of income taxes on lost income, the Missouri court's reference to defendant's proposed argument is exactly on point. This is precisely what FMC attempted to do in this case, and it is this point of law about which FMC admitted to the district court that it was uncertain. To the extent that *Dempsey* is the controlling law, the district court did not err in refusing FMC's proposed cross-examination.

The issue is somewhat clouded, however, by *Nesselrode,* 707 S.W.2d 371. FMC argues that in *Nesselrode* the Missouri Supreme Court explicitly found the sort of cross-examination that FMC attempted to be permissible. By implication, FMC argues that *Nesselrode* silently overrules the precise holding of *Dempsey* which found no error in refusing exactly the sort of cross-examination FMC attempted. We do not agree that *Nesselrode* controls this case.

Indeed, whether a defendant can cross-examine about the effects of income taxes on plaintiff's lost income stream was not even at issue in *Nesselrode.* Rather, the context in which the court makes the reference to cross-examination on which FMC relies concerns a dispute about the reduction of lost income to present value. Both parties in *Nesselrode* argued error in failing to establish the present value of plaintiff's lost income. Specifically, defendant argued that the court should not have allowed the jury to consider a table indicating plaintiff's lost income, since the table contained no reductions to present value. *Id.* at 385-86. The Missouri Supreme Court characterized the issue

even more narrowly. It found the issue to be whether defendant could object to the trial court's ruling on plaintiff's presentation of lost income when defendant itself failed to present any evidence of present value. *Id.* at 387.

In this context, the court mentioned in passing that while defendant did not challenge plaintiff's presentation of present value, defendant did challenge plaintiff's claim for damages. "This was done by presenting evidence in connection with decedent's history of health problems, questioning the three daughters' monetary reliance on decedent, and by *pointing out through cross-examination that decedent's projected stream of lost-income does not take into consideration his income tax obligations.*" *Id.* at 388 (emphasis added). We do not believe that this passing reference to cross-examination can be interpreted in such a way as to overrule *Dempsey*. The propriety of the cross-examination was not at issue in *Nesselrode* and was not addressed by the court. Nor, apparently, was the cross-examination in *Nesselrode* the subject of an objection by plaintiff's cou;nsel at trial. This language in *Nesselrode*, then, is just a mere, isolated reference in passing to the sort of cross-examination attempted by FMC. This same sort of cross-examination, by contrast, was specifically addressed in *Dempsey*. FMC presented no persuasive law to the district court in support of such cross-examination, and it likewise presents none here. Thus, we find no error in the district court's ruling.

III. CONCLUSION

We have considered FMC's other arguments on appeal and find them to be without merit. For the reasons stated, we affirm the judgment of the district court.

HENLEY, Senior Circuit Judge, dissenting.

I respectfully dissent.

The majority acknowledges that the note at the end of the verdict form was confusing; so confusing, in fact, that the

district judge read it one way at trial, only to reach a radically different interpretation a few months later. The majority even goes so far as to recommend that the form as it is now written not be used in future cases. Nevertheless, the court is unable to conclude that use of the form was improper here.

If the district court had given an appropriate instruction that the plaintiff's fault would not reduce his recovery under the strict liability claim, I might be less concerned about the verdict form. The majority points out that the trial judge instructed the jury to find the total amount of damages "disregarding any fault on the part of the plaintiff" and that the jury was told the plaintiff's recovery for negligence would be reduced by the percentage of his fault. These directives, however, provided no guidance on whether the plaintiff's fault would affect his recovery under the strict liability claim. The jury could have understood and followed all of its instructions and still have logically interpreted the note on the verdict form to mean that the plaintiff's recovery under strict liability would be reduced by the percentage of his fault. In these circumstances, I do not believe that the "charge as a whole . . . state[d] the governing law fairly." *Toro Co. v. R & R Products Co.*, 787 F.2d 1208, 1215 (8th Cir. 1986).

There is another troublesome aspect to this case. The majority summarily dismisses without discussing the defendant's argument that the district court should have defined the term "defective condition" in instructing the jury regarding the strict liability theory. The trial judge described in explicit detail what would constitute negligence on the part of the defendant and the plaintiff. *See, e.g.*, Instruction No. 14 (instructing jury to assess a percentage of fault to the defendant if at the time the coal conveyor was sold, the conveyor "had an in-running nip point and shear edge at the transfer chute and was therefore dangerous when put to a use reasonably anticipated"); Instruction No. 16 ("The term 'negligent' or 'negligence' as used in these instructions with respect to Todd Gander means the failure to use that

degree of care that an ordinarily careful and prudent coal conveyor operator would use under the same or similar circumstances."). In contrast, the district court gave no description of what facts would warrant a finding that the conveyor was sold in a "defective condition," as required by the strict liability theory. Given that the district court's ultimate decision regarding the plaintiff's recovery was based on the outcome of the strict liability claim without any regard to jury's findings on the negligence cause of action, it is ironic that the jury had such explicit instructions regarding what particular facts would constitute negligence while being left with no guidance at all regarding the definition of a "defective condition."[1]

Concededly it might be permissible for a trial judge not to give an instruction regarding the definition of a "defective condition" in a single issue products liability action involving a simple consumer good. Yet I cannot agree that a jury may be left with no guidance at all on the definition in a case involving factory equipment with which few typical jurors can be expected to be familiar, and in a case where negligence is defined and the jury can infer from the verdict form that recovery on either negligence, strict liability, or both will be reduced by the percentage of plaintiff's fault.

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[1] The Missouri Supreme Court has indicated in dicta that the Missouri approved jury instructions (MAI) require that the jury not be given a definition of "defective condition." *See Nesselrode v. Executive Beechcraft, Inc.*, 707 S.W.2d 371, 378 & n.11 (Mo. 1986) (en banc); *see also Jarrell v. Fort Worth Steel & Mfg. Co., 666 S.W.2d 828, 837 (Mo. Ct. App. 1984). We have held, however, the MAI provide only guidance, not binding authority, for the giving of instructions in a federal diversity case. See, e.g., Bersett v. K-Mart Corp.*, 869 F.2d 1131, 1134-35 (8th Cir. 1989); *cf. Cowens v. Siemens-Elema AB*, 837 F.2d 817, 822 (8th Cir. 1988) (rejecting argument that *Nesselrode* reasoning prohibited the district court in a diversity case from defining the term "unreasonably dangerous" as used in a strict liability instruction).

I recognize that the plaintiff suffered a grievous injury that might warrant a two-million dollar damage award. I am concerned, however, that the award be the result of a verdict which is free of the taints that affect the one here. Thus, I would reverse and remand for a new trial.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Appeal No. 88-2823-EM

Todd Gander,
Plaintiff/Appellee,

v.

FMC Corporation,
Defendant/Appellant.

On Appeal from the United States District Court
for the Eastern District of Missouri

APPELLANT'S PETITION FOR REHEARING, WITH SUGGESTION FOR REHEARING EN BANC

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TABLE OF AUTHORITIES

UNITED STATES COURT OF APPEALS
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APPELLANT'S PETITION FOR REHEARING, WITH SUGGESTION FOR REHEARING EN BANC

Eighth Circuit Appellate Procedure Rule 16(d) Required Statement:

The undersigned express a belief, based on a reasoned and studied professional judgment, that this appeal raises the following question of exceptional importance: the majority opinion, in addition to being grossly unjust to appellant FMC Corporation, creates an extremely lax rule of harmless error that permits the appellate court to "recommend" that substantial errors be avoided in the future without ensuring that a fair trial is afforded to the parties in the case at issue.

INTRODUCTION

This panel, in a 2-1 decision and despite the strong dissent of the Honorable Judge Henley, affirmed the district court's judgment against FMC Corporation [hereinafter "FMC"] and in favor of plaintiff Todd Gander for $2,000,000. The judgment was affirmed despite the majority's own "reservations about the verdict form" at issue, a verdict form that the majority labelled variously as "misleading," "confusing," "unclear," and "ambiguous." (The verdict form at issue is reproduced, for the Court's convenience, in its entirety on the following page.) The majority went so far as to recommend that the verdict form not be used in future cases, while permitting its use against this defendant. Thus, despite the fact that the verdict form was chosen by and submitted by plaintiff, objected to at trial by defendant, and despite its being so flawed that it led the trial judge to read it one way at trial and in a completely different way four months later, and so unclear as to be effectively banned by the majority from future use in this Circuit, the majority is unwilling to conclude that use of the form was improper in this case.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 87-1155C(6)

Todd Gander,
Plaintiff,

vs.

FMC Corporation,
Defendant,

VERDICT

PART I

NOTE: Complete this form as required by your verdict.

On the claim of plaintiff Todd Gander for personal injury based on the theory of strict liability against defendant FMC/Link-Belt Corporation, we, the jury, find in favor of:

Plaintiff Todd Gander or Defendant FMC/Link-Belt

PART II

NOTE: Complete the following by filling in the blanks as required by your verdict on the claim of plaintiff for personal injury based on the claim of negligence whether or not you found in favor of plaintiff on his claim for personal injury based on product defect. If you assess a percentage of fault to any of those listed below, write in a percentage not greater than 100%. Otherwise, write in "zero" next to that name. If you assess a percentage of fault to any of those listed below, the total of such percentages must be 100%.

On the claim of plaintiff for personal injury based on negligence, we, the jury, assess percentages of fault as follows:

Defendant FMC/Link-Belt	10%	(zero to 100%)
Plaintiff Todd Gander	90%	(zero to 100%)
Total	100%	(zero OR 100%)

PART III

NOTE: Complete the following paragraph if you find in favor of plaintiff on his claim for personal injury based on product defect or if you assessed a percentage of fault to any defendant on plaintiff's claim for personal injury based on negligence.

We, the jury, find the total amount of plaintiff's damages disregarding any fault on the part of plaintiff to be

$2,000,000.00/Two Million Dollars
(stating the amount)

Dated this 15th day of March, 1988.

(Original signed by foreperson)
Foreperson

Note: If you assessed a percentage of fault to any defendant on plaintiff's claim for personal injury based on negligence, the judge will reduce the total amount of plaintiff's damages by any percentage of fault you assess to plaintiff.

FMC brought this appeal on several points, and continues to believe that any one of them provides a sufficient basis for reversal of the district court's judgment (particularly those points regarding the effects of income taxes on plaintiff's lost income stream and whether "defective condition" should have been defined for the jury, a point Judge Henley labelled in dissent as "troublesome" and by itself a sufficient ground for reversal; *see Dissenting Opinion of Henley, J.*, at 23-24). Unquestionably, however, the central point of the appeal is plaintiff's verdict form. For the majority to conclude as it has is patently unfair to FMC and amounts to a gross injustice. Of urgent import to this Court, however, and requiring the Court's attention en banc, is the majority's creation of an extremely lax rule of harmless error that permits the appellate court to "recommend" that substantial and prejudicial errors be avoided in future cases without ensuring that a fair trial is afforded the litigants in the case from which the issue arose.

A. The majority permits use of the verdict form against FMC in this case, but "recommends" that it not be used in future Eighth Circuit cases

Perhaps the most perplexing aspect of the majority opinion is footnote 2. There, the majority states that although it finds the verdict form to be technically correct, it nevertheless "recommend[s] that the form not be used by the federal district courts of this circuit as presently written." *Majority Opinion* at 8 n.2. With due respect to the Court, it is baffling to FMC that the majority, with this footnote, appears to admit that the verdict form is improper, yet is willing to permit it to be used at the expense of FMC in this case. This is patently unfair to FMC, and suggests the following absurdity: if this panel had ruled against FMC on the verdict form points, but reversed on one of the other points and remanded the case for a new trial, presumably footnote 2 would prevent use of the verdict form at the retrial even though it was found "technically correct" by the majority.

On its face, it appears that the majority intends, with footnote 2, that only FMC be victimized by this verdict form. A closer reading of the footnote, however, reveals a precedent of far greater implication and importance to this Court: the footnote serves to curtail appellate review of misleading jury instructions, an area in which appellate courts have traditionally exercised great vigilance. The panel's decision signals a major retreat from the standard of review that has characterized the Eighth Circuit in past decisions. *See, e.g., Monahan v. Flannery,* 755 F.2d 678 (8th Cir. 1985); *Slater v. KFC Corp.,* 621 F.2d 932 (8th Cir. 1980); *see also Toro Co. v. R & R Prods. Co.,* 787 F.2d 1208 (8th Cir. 1986). The opinion extends an unfortunate invitation to the district courts to dispense with careful scrutiny of form instructions for the purpose of eliminating "misleading," "confusing," "unclear," or "ambiguous" language. The district courts' incentive to avoid errors is reduced if errors are not corrected on appeal and are instead dealt with only through prospective "recommendations." The administration of litigation in this circuit requires more than this.

Moreover, the footnote arguably deprives FMC of its rights to due process under the Fifth and/or Fourteenth Amendments to the United States Constitution. American jurisprudence recognizes that courts must adhere to previously declared rules for adjudicating a claim or at least not deviate from those rules in a manner that is unfair to the entity against whom the action is to be taken. In this case, FMC is deprived of the protection afforded by the panel to future litigants from precisely the ills and result at issue here. The precedent set with this opinion is already widely viewed as proscribing the use of the verdict form. *See Court Urges Against Use of MAI 35.15 Verdict Form,* Mo. Law. Weekly, January 22, 1990, at 1. As a consequence of the "recommendation," FMC alone is left with no recourse while the rights of future litigants will remain intact. Surely, this represents an untenable and unfair result.

B. The majority's characterizations of the verdict form conflict with its holding

In the first paragraph of its opinion, the majority admits its own "reservations about the verdict form." *Majority Opinion* at 1. The majority then acknowledges that the "jury may, indeed, have been misled by the closing note" of the verdict form, *id.* at 7; a note the Court also found to be ambiguous, *id.;* and "unclear," *id.* at 8. Then, after straining to conclude that the form does not misstate Missouri law, the panel admits that the "form is, however, at least potentially confusing to the jury." *Id.* at 8. Similar characterizations may be found in several other places as well. *See id.* at 8-10. Nevertheless, the panel holds the form to be proper. Finally, the majority, despite its holding, "recommend[s] that the form not be used by the federal district courts of this circuit as presently written." *Id.* at 8 n.2.

The majority opinion with regard to the verdict form is problematic—and unfair to FMC—for a number of reasons. First, the majority apparently fails to take into account the fact that the verdict form was submitted by plaintiff, and yet is construed against FMC. The panel's reasoning would be less obscure had the form been submitted by FMC; certainly, FMC could then more understandably be held accountable for the numerous problems the majority acknowledges to be present. Instead, the form was submitted by plaintiff and given to the jury over FMC's objection. FMC should not be made to bear the consequences of a verdict form submitted by plaintiff that is "confusing," "ambiguous," "unclear," and "misleading."

The majority also fails to attach any significance to the fact that the verdict form was, as stated by Judge Henley in dissent, "so confusing . . . that the district judge read it one way at trial, only to reach a radically different interpretation a few months later." *Dissenting Opinion of Henley, J.,* at 22. As the trial judge stated on the record with regard to the form's closing note, "This is directing me to reduce [the verdict] by 90 percent." *Trial Transcript,* vol. 3, at 274. The improper nature

of the form, in the face of the trial judge's own opinion at the time of trial—and original entry of judgment for $200,000—is self-evident. Indeed, the trial judge's reversal serves to underscore the impropriety of the verdict form.

C. **The verdict form misstates Missouri law**

The majority apparently resolves, to its satisfaction, the foregoing points with its conclusion that the verdict form "does not misstate Missouri law," *Majority Opinion* at 8; and is therefore proper, albeit only in this instance. *Id.* at 8 n.2. In reaching that conclusion, the majority first acknowledges that the closing note "can be read to require a reduction, based on plaintiff's comparative fault on the negligence claim, in the strict liability claim." *Id.* the Court then writes that "[a]lthough the note leaves open this possibility, it does not, as the district court initially thought, *require* it." *Id.* that statement, in light of the Court's conclusion that the form does not misstate the law, is problematic for two reasons: first, it contradicts what the majority admits is one reading of the form; second, and more importantly, if the note can be read to require a reduction in the strict liability claim, as the Court admits, then that *is* a misstatement of Missouri law. Assuming, *arguendo,* that the form correctly stated the law, it did so in a manner so unfair and inadequate as to adversely affect FMC's substantive rights. In such instances, reversal and remand for a new trial is required. *See, e.g., Monahan v. Flannery,* 755 F.2d 678 (8th Cir. 1985) (reversing on ground that jury was not fairly or adequately instructed).

Once it concludes that the verdict form does not misstate the law, the majority attempts to justify its holding with several lines of reasoning that really are not germane to this appeal. First, the Court observes that, given correct instruction, a jury's misunderstanding or misapprehension of the law cannot be used to impeach a verdict. *Majority Opinion* at 11. FMC has never maintained that the jury misunderstood what it was told or that

it failed to follow the district court's instructions. The majority also notes that although no improper impeachment occurred in this case, if impeachment had occurred, it would have been improper. *Id.* at 12-13. Again, this was not at issue. Finally, the panel points out that plaintiff's injuries support a verdict for $2,000,000. *Id.* at 13-15. FMC has never disputed the extensive and serious nature of plaintiff's injuries. The injuries by themselves, however, beg the question of causation. If a man shoots himself through the head with a handgun, he will obviously suffer great injury, but that alone does not entitle him to damages from the manufacturer of the gun. Moreover, in the case at bar, the jury assessed plaintiff's total damages to be $2,000,000, but also found him to be 90% at fault, a point largely ignored by the majority. The damages question must be considered in light of plaintiff's fault: although the panel may be correct that plaintiff's injuries, by themselves, support a $2,000,000 verdict, it is equally correct that the reduced verdict is entirely appropriate in view of the overwhelming fault the jury assessed to plaintiff.

D. The jury was never informed that comparative fault does not apply to strict liability

The Court next states that "the district court also properly instructed the jury that comparative fault principles do not apply to strict liability claims," and quotes as support Instruction 18, which concerns the reduction of a recovery on the negligence claim. *Majority Opinion* at 10. The standard to be applied in such analyses is whether the instructions as a whole "*fairly and fully* presented the issues to the jury." *Hrzenak v. White-Westinghouse Appliance Co.*, 682 F.2d 714, 720 (8th Cir. 1982) (citations omitted) (emphasis added). Nowhere in the instant charge is there any instruction telling the jury that plaintiff's fault would not reduce his recovery under the strict liability claim. As stated by Judge Henley in dissent, the directives contained in the instructions:

> provided no guidance on whether the plaintiff's fault would affect his recovery under the strict liability claim. The jury could have understood and followed all of its instructions and still have logically interpreted the note on the verdict form to mean that the plaintiff's recovery under strict liability would be reduced by the percentage of his fault.

Dissenting Opinion of Henley, J., at 22-23.

Compounding this unfairness was the district court's refusal to define the term "defective condition" in instructing the jury regarding the strict liability theory, despite FMC's request that it do so. As stated by Judge Henley, although the trial judge "described in explicit detail what would constitute negligence," the court "gave no description of what facts would warrant a finding that the conveyor was sold in a 'defective condition,' as required by the strict liability theory." *Dissenting Opinion of Henley, J.,* at 23. In light of the trial court's—and the majority's—findings that plaintiff's recovery was based solely on the strict liability claim, with the 90% fault assigned to plaintiff thereby relegated to irrelevance, it is indeed troublesome that the jury was provided no guidance at all as to the meaning of strict liability or its constituents.

The issue of whether comparative fault applies to strict liability was neither "fairly" nor "fully" presented to the jury; indeed, it cannot be maintained that Instruction 18 or any other instruction in the charge provided the jury with any guidance whatsoever on this critical point or even told the jury what "strict liability" or its elements mean. Moreover, even assuming that Instruction 18 could reasonably be extended as suggested by the majority, "[a]n error as to a specific instruction 'is not cured by general statements which set out the respective contentions.' " *Monahan,* 755 F.2d at 684 (citation omitted). The panel's holding represents a marked shift away from the long line of Eighth Circuit decisions requiring fair, full, and

adequate instructions on the law, a shift this Court should reconsider.

E. The majority's position requires as much speculation as does the view that the jury intended to award $200,000

Part of the Court's hesitancy to reverse the trial court apparently stems from its belief that to do so would require it to speculate that the jury calculated the total damages in anticipation of a reduction by the trial court for plaintiff's comparative fault. *Majority Opinion* at 11. FMC submits, however, that a finding that the jury intended plaintiff to receive $2,000,000 and not $200,000 requires every bit as much speculation. Indeed, there are many reasons to believe the jurors intended the smaller award, not the least of which is the attribution of 90% fault to plaintiff. Although ignored by the majority, there was ample testimony at trial to support such a substantial assessment of fault to plaintiff.[1]

A primary purpose of review of a trial court's instructions is to ensure that the jury has not been left to guess about the proper application of the law to the facts of the case. The mere fact that one must speculate at all as to the jury's intent serves only to highlight the unfairness of the verdict form.

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[1] To cite but one example, plaintiff's expert engineer, Boulter Kelsey, admitted that plaintiff, as a competent operator of the machine in question, would have recognized the danger associated with its use. *Trial Transcript,* vol. 1, at 282.

CONCLUSION

FMC is entitled to a determination of damages "free of the taints that affect the one here." *Dissenting Opinion of Henley, J.*, at 24. The trial of this case took only five days. Surely a new trial is a reasonable way to ensure both that the verdict be free of those taints and that FMC be afforded the protection the majority provides future litigants through its "recommendation" contained in footnote 2.

The verdict form at issue here was grossly unfair and unjust to FMC. The cure of gross injustice may serve as basis for en banc consideration of an appeal. *See, e.g., United States v. Lynch,* 690 F.2d 213, 215 n.22 (D.C. Cir. 1982). Further, this Court should revisit the ominous precedent established by the panel through its prospective "recommendation." Accordingly, FMC respectfully requests rehearing en banc.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that two (2) copies of the foregoing was mailed, postage prepaid, this 26 day of January, 1990, to: James E. Hullverson, Jr., Esq., The Hullverson Law Firm, 1010 Market Street, Suite 1550, St. Louis, MO 63101, counsel for appellee.

/s/ John C. Shepherd

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 88-2823EM

Todd Gander,
Appellee,

vs.

FMC Corporation,
Appellant.

Appeal from the United States District Court
for the Eastern District of Missouri

The suggestion for rehearing en banc filed by appellant has been considered by the court and is denied by the reason of the lack of a majority of the active judges voting to rehear the case en banc.

Petition for rehearing by the panel is also denied.

February 22, 1990

Order entered at the Direction of the Court:

/s/ Robert D. St. Vrain

Clerk, U. S. Court of Appeals, Eighth Circuit.

APPENDIX H

Subsidiaries and Affiliates of Petitioner

Asia Lithium Corporation
Asia Pacific Agricultural Development Corporation
CBV - Industria Mecanica, S.A.
The Chitin Company, Inc.
Cimflex Teknowledge Corporation
Centocor, Inc.
Coproqui S.A.
Electro Quimica Mexicana, S.A. de C.V.
Fabricacion, Maquinaria y Ceras, S.A. de C.V.
FMC Agroquimica de Mexico, S. de R.L. de C.V.
FMC Employees Service Corporation
FMC Foundation
FMC Gabon S.A.R.L.
FMC Gold Canada Ltd.
FMC Gold Company
FMC Gold International Sales Corporation
FMC Guatemala, S.A.
FMC (Ireland) Ltd.
FMC Jerritt Canyon Corporation
FMC-Kramer S.A. Industria Comercio
FMC de Mexico S.A. de C.V.
FMC Minerals Corporation
FMC Nurol Savunma Sanayii A.S.
FMC Paradise Peak Corporation
FMC Petroleum Equipment Limited
P.T. FMC Santana Petroleum Equipment Indonesia
FMC Saudi Arabia Limited
FMC Services & Supplies Occidente, S.A.
FMC Services & Supplies Oriente, S.A.

FMC (Thailand) Limited
FMC Wellhead de Venezuela, S.A.
Food Machinery Coordination Center, S.A.
Foret, S.A.
Foret Arif Libanaise, S.A.R.L.
Freeport/FMC Foreign Sales Corporation
H Two O Two Limited
Huron Forge and Machine Company
Kosmos Industrial Investments and Commerce A.S.
L. H. Company, Ltd.
Link-Belt Construction Equipment Company
Natural Product Sciences, Inc.
Norfolk Investments Limited
Perorsa
Phillippine Marine Products, Inc.
S.A. Mather et Platt
SeparaSystems Inc.
Sibelco Espanola, S.A.
Thai Peroxide Company, Ltd.
Tokai Electro-Chemical Company, Limited
Tripoliven, C.A.
Turegano, S.A.

(2)

No. 89-1829

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

FMC CORPORATION,
Petitioner,

vs.

TODD GANDER,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

I. In a diversity action for personal injuries based on product liability law of Missouri, does federal law mandate jury instructions on (a) the effect of taxes on future lost earnings and (b) the non-taxability of a jury's award of damages where applicable Missouri law precludes such instructions?

II. Is an appropriate case presented for review of Question I by certiorari where the defendant failed to tender such instructions at trial and made no complaint in the Court of Appeals regarding the absence of such instructions?

III. In such a diversity action, does federal law mandate cross-examination by defense counsel of plaintiff's economist regarding the income tax effects on lost future earnings where Missouri law precludes such cross-examination?

IV. Is an appropriate case presented for review of Question III by certiorari where the trial court *allowed* defense counsel to conduct such cross-examination, but also stated it would grant a mistrial if plaintiff could show that such cross-examination was improper, and defense counsel voluntarily chose to make no further efforts to cross-examine the economist about income taxes?

V. Where Missouri law permits no reduction of damages under a strict liability theory in connection with an assessment of a percentage of fault to plaintiff under a comparative negligence theory, and where the Court of Appeals expressly recognized that the jury was properly instructed on those issues, is a new trial mandated by [illegible] of a concluding "note" in a verdict form (not an instruc-

tion as petitioner represents to the Court) which the Court of Appeals held was legally correct but "potentially confusing"?

VI. Is an appropriate case presented for review of Question V by certiorari where the defendant made no specific objection to the concluding "note" under Rule 51, Fed.R.Civ.Pro., and tendered no alternative verdict form or language to clarify the meaning of that "note"?

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No. 89-1829

IN THE

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OCTOBER TERM, 1989

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Petitioner,

VS.

TODD GANDER,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI

STATEMENT OF THE CASE

Defendant FMC Corporation (hereinafter "FMC") appealed a judgment in favor of Todd Gander for Two Million Dollars. This judgment was entered by the District Court on July 13, 1988, following a jury trial.

Jurisdiction in the District Court was based on diversity of citizenship. Missouri law of product liability was applicable.

Gander's theories of recovery for personal injuries were alternative theories of strict liability and negligence. Under Missouri law, comparative negligence applied only to a negligence theory and not to the strict liability theory. The jury found in favor of Gander on the strict liability theory. The jury also found in favor of Gander on the negligence theory and assessed ten percent fault to FMC and ninety percent fault to Gander. The jury assessed Gander's total damages at Two Million Dollars.

The District Court initially entered judgment for Two Hundred Thousand Dollars. However, on Gander's motion to amend judgment, the District Court held that Gander was entitled to Two Million Dollars on the strict liability claim which could not be reduced by Gander's comparative fault under Missouri law. The judgment of the District Court was affirmed by the United States Court of Appeals for the Eighth Circuit. *Gander v. FMC Corp.*, 892 F.2d 1373 (8th Cir. 1990).

On February 23, 1985, while working for Anheuser-Busch in St. Louis, Todd Gander lost his right arm at the elbow while working as a coal conveyor operator. At the time of trial, the average pay for coal conveyor operators was approximately $48,000.00 plus benefits.

The coal conveyor on which Gander was injured was manufactured by defendant FMC without a guard at the in-running nip point at the head pulley drum.

As coal was being conveyed, coal dust would accumulate on the drum. On February 23, 1985, the head pulley drum on the FMC conveyor had become clogged with coal and was responsible for a major coal spill. Gander had been taught to clean the drum with a fox tail brush. As Gander proceeded to clean the drum with a fox tail brush, the rolling drum caught the brush and pulled Gander's forearm into the device before he was able to let go. Gander's right arm was severed at the elbow when it came into contact with a shear guard.

Gander was taken to a hospital where his arm was reattached. However, his arm is useless. Attempts at vocational rehabilitation were unsuccessful and Gander was discharged from work in August of 1987. He now does volunteer work at a local hospital.

Uncontradicted figures for lost wages, past and future, establish damages in excess of Two Million Dollars. Gander's lost wages for his work life expectancy of twenty-seven years

would be close to One Million Seven Hundred Thousand Dollars. R., Vol. 1, 318. Alternative lost wage scenarios ranged from One Million Eight Hundred Thousand Dollars to Two Million Two Hundred Thousand Dollars. *Id.* at 320-22.

Gander's physicians testified that his right arm was almost useless. He has no use of his fingers, which frequently swell and develop ulcers. Gander has permanent, burning pain in his fingers, which are otherwise numb. He must wear a splint to support his wrist and a glove to keep down the swelling in his hand. The arm is subject to injury and heals slowly. These injuries are permanent. R., Vol. 2 at 34-59.

Gander's psychiatrist testified that his injuries have caused substantial psychological problems. Initially, Gander was severely depressed and suicidal and had to be hospitalized for treatment. R., Vol. 2 at 75. Gander is still under monthly psychiatric treatment with his symptoms in a constant state of flux. R., vol. 2, 75, 80. While Gander is no longer suicidal, the scars on his body from skin grafts, nerve and vein transplants, and muscle harvesting are devastating to Gander's self-image. R., Vol. 2 at 77. Gander suffers from insomnia, is easily frustrated and irritable, has decreased interest in intimacy with his wife, and harbors feelings of hopelessness and worthlessness with a poor outlook for the future. R., Vol. 2 at 90. The psychiatrist testified that Gander was totally disabled on the basis of his psychiatric difficulties alone. R., Vol. 2 at 84. Thus, the Court of Appeals held that there was substantial evidence supporting the jury's calculation of total damages at Two Million Dollars. 892 F.2d at 1380. See Appendix, A-12.

SUMMARY OF ARGUMENT

I and II. This Court's decision in *Liepelt* does not mandate jury instructions on the effect of taxes on future lost earnings and the non-taxability of a jury award for personal injuries in a *diversity action* based on product liability law of Missouri. Missouri law precludes such jury instructions. The Eighth Circuit correctly ruled this issue. Petitioner failed to request any "tax" instructions in the District Court and made no complaint in the Court of Appeals regarding the absence of such instructions. Therefore, Petitioner does not present an appropriate issue for review by this Court.

III and IV. *Liepelt* does not mandate cross-examination of plaintiff's economist regarding income tax effects on lost future earnings in a *diversity action* under Missouri law. Missouri law precludes such cross-examination. The Eighth Circuit correctly ruled this issue. The relevant District Court ruling actually *allowed* Petitioner to conduct such cross-examination with the caveat that plaintiff would be granted a mistrial if plaintiff proved the ruling to be wrong. Petitioner *voluntarily* made no further efforts at such cross-examination and made no offer of proof. Therefore, Petitioner does not present an appropriate issue for review.

V and VI. Under Missouri law of product liability, comparative negligence of the plaintiff does reduce damages under a strict liability theory. Jury instructions on those issues were held to be clear and correct by the Eighth Circuit. A new trial is not re-

quired because of a closing "note" on a verdict form (not an instruction as represented by Petitioner) which the Court of Appeals also held was legally correct but may have been "potentially confusing". Petitioner failed to object to that "note" at trial (Rule 51, Fed.R.Civ.Pro.) and failed to tender an alternative verdict form or clarifying language for the "note". The Court of Appeals correctly ruled this issue. Therefore, Petitioner does not present an appropriate case for review.

ARGUMENT

I

THIS CASE INVOLVES A DIVERSITY ACTION FOR PERSONAL INJURIES BASED ON PRODUCT LIABILITY LAW OF MISSOURI. APPLICABLE MISSOURI LAW PRECLUDES JURY INSTRUCTIONS ON THE EFFECT OF TAXES ON FUTURE LOST EARNINGS AND THE NON-TAXABILITY OF A JURY'S AWARD OF DAMAGES. THIS COURT'S DECISION IN *LIEPELT* DOES NOT MANDATE SUCH INSTRUCTIONS IN DIVERSITY ACTIONS DETERMINED UNDER STATE LAW.

Petitioner, FMC Corporation (hereinafter "FMC"), inappropriately lumps together issues regarding evidence, argument, and jury instruction involving the effects of federal income tax on a plaintiff's lost income stream and on the non-taxability of a jury's damage award. FMC apparently does so in an attempt to obfuscate the issues in order to obtain review by this Court despite the fact that many of these issues were neither preserved in the trial court nor raised in the Court of Appeals. FMC also represents to the Court that the decision of the Court of Appeals in this case is in conflict with the decision of the Seventh Circuit in *In Re: Air Crash Disaster Near Chicago, Ill.*, 701 F.2d 1189 (7th Cir.), cert. denied, 464 U.S. 866, 78 L.Ed.2d 178, 104 S.Ct. 204 (1983). FMC conveniently fails to cite to this Court the vast body of law decided by the United States Courts of Appeals to the effect that taxability instructions in diversity cases are questions of state law and that such instructions are not mandated in diversity cases by this Court's decision in *Norfolk & Western Ry. Co. v. Liepelt*, 444 U.S. 490, 62 L.Ed.2d 689, 100 S.Ct. 755 (1980).

This case involves a diversity action for personal injuries based on product liability law of the State of Missouri. Plaintiff, Todd Gander, had his arm literally torn off by an unguarded piece of machinery manufactured by FMC.

Applicable Missouri law precludes jury instructions on the effect of taxes on future lost earnings and the non-taxability of a jury's award of damages. *Missouri Approved Jury Instructions,* Third Edition, MAI 4.01; *Kenton v. Hyatt Hotels Corp.,* 693 S.W.2d 83 (Mo. 1985); *Tennis v. General Motors Corp.,* 625 S.W.2d 218 (Mo.App. 1981); and *Senter v. Ferguson,* 486 S.W.2d 644 (Mo.App. 1972).

This Court's decision in *Liepelt* determined that, in FELA actions, the jury should receive evidence of the effect of income taxes on lost wages and an instruction on the non-taxability of a final award. The decision in *Liepelt* was premised upon the federal questions involved in FELA cases and the need for uniformity in cases decided under federal law.

The rationale of *Liepelt* was further delineated by this Court in *Gulf Offshore Co. v. Mobil Oil Corp.,* 453 U.S. 473, 69 L.Ed.2d 784, 101 S.Ct. 2870 (1981). In *Gulf Offshore Co.,* this Court remanded a case under the Outer Continental Shelf Lands Act (43 U.S.C., Sec. 1331 et. seq.) to the Texas Court of Civil Appeals for a determination of whether Louisiana law required a "non-taxability instruction" and, if it did not, whether *Liepelt* displaced the state rule in an OCSLA case. That case was remanded with directions from this Court that, if it was error to refuse such an instruction, the state court could then address arguments that failure to give such an instruction did not constitute prejudicial error.

Numerous decisions of the United States Courts of Appeals have expressly recognized that taxability instructions are questions of state law in diversity cases and that *Liepelt* does not mandate such instructions in diversity actions determined under state law. *Gander v. FMC Corp.,* 892 F.2d 1373 (8th Cir. 1990); *Adams v. Fuqua Industries, Inc.,* 820 F.2d 271 (8th Cir. 1987); *Bartak v. Bell-Galyardt & Wells, Inc.,* 629 F.2d 523 (8th Cir. 1980); *Losey v. North American Philips Consumer Electronics Corp.,* 792 F.2d 58, 61-62 (6th Cir. 1986); *Estate of Spinosa,* 621 F.2d 1154, 1158-59 (1st Cir. 1980); *Vasina v. Grumman*

Corp., 644 F.2d 112, 118 (2d Cir. 1981); *Shu-Tao Lin v. McDonnell Douglas Corp.*, 742 F.2d 45, 50-51 (2d Cir. 1984); *Croce v. Bromley Corp.*, 623 F.2d 1084, 1096-97 (5th Cir. 1980), cert. denied, sub nom *Bromley Corp. v. Cortese*, 450 U.S. 981, 100 S.Ct. 1516, 67 L.Ed.2d 816 (1981); *Hansen v. Johns-Manville Products Corp.*, 734 F.2d 1036, 1045 (5th Cir. 1984), cert. denied, 470 U.S. 1051, 105 S.Ct. 1739, 84 L.Ed.2d 814; *Fenasci v. Traveler's Insurance Co.*, 642 F.2d 986, 989 (5th Cir.), cert. denied, 454 U.S. 1123, 100 S.Ct. 971, 71 L.Ed.2d 110 (1981).

A close reading of the Seventh Circuit decision in *In Re: Air Crash Disaster Near Chicago, Ill.*, 701 F.2d 1189, 1200 (7th Cir. 1983), indicates that there is no real conflict among the circuits. In that case, the Seventh Circuit reviewed Illinois law and stated its belief that Illinois decisions were based on a misapprehension of federal law and that the giving of a "non-taxability instruction" would be harmless at most. *Id.* 701 F.2d 1199, 1200. The Seventh Circuit also recognized that its conclusion would be different if Illinois interpreted its own substantive law to preclude such an instruction. *Id.* 701 F.2d at 1200, n. 7. The Seventh Circuit did not hold that federal law mandated such an instruction in a diversity case. Rather, the Seventh Circuit held that the District Court was free to give the tax instruction despite contrary state procedure. *Id.* 701 F.2d 1200.

Therefore, under Supreme Court Rule 10.1(a), there is no "conflict" among the circuits on these issues. Rather, the Circuit Courts of Appeals are relatively uniform and support the decision of the Eighth Circuit in this case.

II

PETITIONER FAILED TO TENDER ANY "INCOME TAX" INSTRUCTIONS TO THE TRIAL COURT AND MADE NO COMPLAINT IN THE COURT OF APPEALS REGARDING THE ABSENCE OF SUCH INSTRUCTIONS. THEREFORE, THIS CASE IS NOT APPROPRIATE FOR REVIEW BY CERTIORARI ON THAT ISSUE.

Supreme Court Rule 15.1 requires that a Brief in Opposition to a Petition for Certiorari should address any perceived misstatements of fact or law which have a bearing on the question of what issues would properly be before the Court if certiorari were granted. FMC seeks review by certiorari by contending that *Liepelt* mandates the giving of "taxability instructions". However, FMC completely fails to advise this Court that FMC totally failed to preserve any such issue in either the District Court or in the Court of Appeals.

FMC requested *no* instructions regarding income tax effects on lost future income.

FMC requested *no* instruction on the non-taxability of a jury's award of damages.

FMC made *no* objection to the damage instruction given by the trial court at the request of plaintiff.

The only instruction relating to damages tendered by FMC at trial was a "present value" instruction patterned after *Federal Jury Practice & Instructions*, Devitt, Blackmar & Wolff, Fourth Edition, Vol. 3, Sec. 85.11. This "present value" instruction had absolutely no relationship to, and did not mention, taxes.

In its Brief on Appeal before the Eighth Circuit, the *only* issue raised by FMC related to cross-examination of plaintiff's damage witnesses and closing argument. Quoted portions from FMC's "Brief for Appellant", consisting of Question 3 from

the Questions Presented section, and Point III from the Argument section, are as follows:

> **Question 3:** Whether counsel for FMC Corporation should have been permitted to cross examine plaintiff's damages witnesses regarding the effects of ineome tax upon plaintiff's lost income stream, and to mention those effects during closing argument. (Brief for Appellant, page 3.)

POINT III

> COUNSEL FOR FMC SHOULD HAVE BEEN PERMITTED TO CROSS EXAMINE PLAINTIFF'S DAMAGES WITNESSES REGARDING THE EFFECTS OF INCOME TAX UPON THE PLAINTIFF'S LOST INCOME STREAM, AND TO ARGUE THOSE EFFECTS DURING CLOSING ARGUMENT. (Brief for Appellant, page 17)

As is obvious, FMC completely failed to preserve any allegation of error regarding instructions relating to taxes in either the District Court or in the Court of Appeals.

For these reasons, review by certiorari would not be appropriate.

III

MISSOURI LAW PRECLUDES CROSS-EXAMINATION REGARDING INCOME TAX EFFECTS ON LOST FUTURE EARNINGS. FEDERAL LAW DOES NOT MANDATE SUCH CROSS-EXAMINATION.

The Eighth Circuit quite properly held that Missouri law precludes cross-examination and closing argument regarding income tax effects on lost future earnings. *Gander v. FMC Corp.*, 892 F.2d 1373, 1383 (8th Cir. 1990). In *Dempsey v. Thompson*, 363 Mo. 339, 251 S.W.2d 42, 45 (1952); the Missouri Supreme Court held that:

> The trial court did not err either in refusing to permit defendant to cross-examine the plaintiff's actuarial witness relative to income tax liability or in refusing to permit defendant to argue to the jury that in arriving at the amount of its award it should consider only the amount of future earnings lost to plaintiff after deduction of income taxes for which he would have been liable had he continued his employment without injury.

In this regard, Missouri follows the majority rule set forth in the Restatement (Second) of Torts, Sec. 914(a)(2) (1977), which provides as follows:

> "The amount of an award of tort damages is ordinarily not diminished because of the fact that, although the award is not of itself taxed, all or part of it is to compensate for the loss of future benefits that would have been subject to taxation."

For all of the reasons set forth in Point I of this Brief, federal law does not mandate such cross-examination or closing argument in a diversity case.

FMC attempts to rely on *Nesselrode v. Executive Beechcraft, Inc.*, 707 S.W.2d 371 (Mo. 1986). *Nesselrode* did not involve any issue of cross-examination or closing argument regarding income tax effects on lost future earnings. Rather, *Nesselrode* involved alleged error in the use of a table which allegedly did not contain reductions to present value. *Id.* at 385-386. This "present value" issue in *Nesselrode* was decided in light of the fact that the defendant itself failed to present any evidence of present value. *Id.* at 387. In deciding this issue, the Missouri Supreme Court mentioned *in passing* that cross-examination was conducted with regard to the fact that the decedent's projected stream of lost income did not take into consideration his anticipated income tax obligations. *Id.* at 388.

The propriety of this cross-examination was not at issue in *Nesselrode* and was not addressed by the Missouri Supreme Court. The decision in *Dempsey* was not even discussed in *Nesselrode*. Certainly the decision in *Dempsey* was not overruled by *Nesselrode*.

The Eighth Circuit properly decided this issue and certiorari would be inappropriate in this case.

IV

THE TRIAL COURT RULED THAT IT WOULD ALLOW PETITIONER TO CROSS-EXAMINE PLAINTIFF'S ECONOMIST ON INCOME TAX EFFECTS ON FUTURE EARNINGS, AND ALSO STATED THAT IT WOULD GRANT A MISTRIAL IF PLAINTIFF COULD SHOW SUCH CROSS-EXAMINATION WAS IMPROPER. PETITIONER VOLUNTARILY CHOSE TO MAKE NO FURTHER EFFORTS TO CROSS-EXAMINE THE ECONOMIST ABOUT INCOME TAXES. THEREFORE, THIS CASE IS NOT APPROPRIATE FOR REVIEW BY CERTIORARI ON THAT ISSUE.

Despite the fact that the Eighth Circuit generously considered the merits of FMC's argument regarding cross-examination of plaintiff's economist on income tax effects on future earnings, *FMC fails to advise this Court that the ruling of the trial court was actually in FMC's favor.* The trial transcript on appeal contains the following exchange and ruling by the trial court. (R., Vol 1, pages 344, line 14 through 345, line 12).

" THE COURT: Mr. Hullverson says as a matter of law that you can't get into it.

MR. HULLVERSON: That's correct.

MR. VENKER: I think that's wrong, Judge, and I think it would hamper me prejudicially with an economist present to not be able to question him in that regard. That is, if there were no economist maybe we couldn't get an instruction on it at the end of the case.

THE COURT: Well, if you do I'll go ahead and let you — Mr. Hullverson shows that I'm wrong I'll grant a mistrial at your request, okay?

MR. HULLVERSON: Okay.

THE COURT: Okay.

MR. VENKER: So we're talking about —

THE COURT: I'm going ahead and letting you based on your representation, but if you're wrong I'm going to grant a mistrial.

MR. VENKER: Your Honor —

THE COURT: Okay?

MR. VENKER: — are we talking about income tax or present value or both?

THE COURT: Whatever you want to do.

MR. VENKER: All right."

The trial court indicated that it would allow FMC to do whatever it wanted to do with regard to cross-examination on the subject of income taxes and present value. The trial court cautioned that if plaintiff could show that such cross-examination was improper, a mistrial would be granted.

FMC voluntarily chose to make no further efforts to cross-examine the economist about income taxes.

On such a record, this case clearly is not appropriate for review by certiorari on that issue.

The only other incident regarding income taxes which took place at trial involved plaintiff's witness, Crawford. Crawford

was a union representative who testified briefly about wages earned by coal conveyor operators. FMC attempted to ask whether Crawford's income figures were "net or gross". An objection to this question of this witness was sustained. (R., Vol. 2, 70-71). The trial court was well within its discretion in refusing to allow this cross-examination at this juncture of the trial. Federal Rules of Evidence, Rule 611(b). Such evidence would have been completely out of context and without any opportunity for explanation. Plaintiff's economist had concluded his testimony and FMC had no economist waiting to testify.

Crawford was a lay witness - basically a records custodian. No foundation was established by FMC that this witness was competent to testify about income taxes. Even if the witness had been allowed to respond that the wage rate for coal operators was a "gross" rate, such testimony would have been in a vacuum, unrelated to any meaningful testimony by any economist or other witness.

FMC fails to advise this Court that FMC never even attempted to make an offer of proof with either one of these witnesses. Federal Rules of Evidence, Rule 103(a)(2).

Therefore, FMC was not the victim of an adverse ruling by the trial court in connection with the economist's testimony. The only relevant ruling made by the trial court was actually in favor of FMC. No appropriate issue was before the Appellate Court. Certainly, there is no appropriate issue before this Court for review by certiorari.

V

MISSOURI LAW PERMITS NO REDUCTION OF DAMAGES AWARDED UNDER A STRICT LIABILITY THEORY BY ANY PERCENTAGE OF FAULT ASSESSED TO PLAINTIFF UNDER A COMPARATIVE NEGLIGENCE THEORY. THE COURT OF APPEALS EXPRESSLY RECOGNIZED THAT THE JURY INSTRUCTIONS ON THOSE ISSUES WERE CLEAR AND CORRECT. A NEW TRIAL IS NOT REQUIRED BY REASON OF A CONCLUDING "NOTE" IN A VERDICT FORM (NOT AN INSTRUCTION AS REPRESENTED BY THE PETITIONER TO THIS COURT) WHICH THE COURT OF APPEALS HELD WAS LEGALLY CORRECT BUT "POTENTIALLY CONFUSING".

This product liability case was submitted to the jury on alternative theories of strict liability and negligence against defendant FMC in accordance with Missouri Supreme Court approved Illustration 35.15 (effective January 1, 1988). *Missouri Approved Jury Instructions,* Third Edition, 1989 Pocket Part, pages 122-133. MAI Illustration 35.15 is the Missouri Supreme Court approved method for submission of negligence and strict liability where comparative fault is applicable only to the negligence theory in accordance with the decision in *Lippard v. Houdaille Industries,* 715 S.W.2d 491 (Mo. 1986).

In *Lippard,* the Missouri Supreme Court stated as follows:

> "We conclude that there should be no change in the Missouri common law rule, as established in the *Keener* opinion (citation omitted), that the plaintiff's contributory negligence is not at issue in a products liability case. *It should neither defeat nor diminish recovery* . . . if the product is a legal cause of injury, then even a negligent plaintiff should be able to recover." (715 S.W.2d at 493, emphasis supplied).

> **"We adhere to the view that distributors of 'defective products unreasonably dangerous' should pay damages for injuries caused by the products, without reduction because a plaintiff may have been guilty of a degree of carelessness." (715 S.W.2d at 494).**

The Missouri Supreme Court clearly has indicated the viability of submission of alternative theories of strict liability and negligence in a products liability case. *Lippard v. Houdaille Industries,* 715 S.W.2d at 494, n. 3; and *Nesselrode v. Executive Beachcraft, Inc.,* 707 S.W.2d 371, 373 (Mo. 1986). Likewise, the decisions of the Eighth Circuit have recognized that the submission of multiple theories of negligence and strict liability is appropriate under Missouri law. *Vanskike v. ACF Industries, Inc.,* 665 F.2d 188 (8th Cir. 1981); and *Lewy v. Remington Arms Co., Inc.,* 836 F.2d 1104, 1106 (8th Cir. 1988).

In this case, the jury clearly found in favor of plaintiff and against the defendant on the strict liability theory. On the negligence theory, the jury determined that both FMC and the plaintiff were negligent. On this negligence theory, the jury assessed ten percent fault to the defendant and ninety percent fault to the plaintiff. Under *Lippard,* comparative fault applies only to a negligence theory and does not apply to a theory of strict liability. Finally, the jury determined that plaintiff's total damages, disregarding fault on the part of the plaintiff, was Two Million Dollars.

The following statement appears on pages 1 and 2 of the Jurisdictional Statement of FMC's Petition for Writ of Certiorari.

> **"On March 15, 1988, the jury returned a verdict in favor of plaintiff and the trial judge entered judgment in the amount of $200,000.00. See infra Appendix at A-1. On July 13, 1988, the trial judge amended the jury's award to $2,000,000.00 and entered judgment in that amount. See infra Appendix at A-2."**

These characterizations of the verdict and the trial court's actions are misleading. The only amount set forth by the jury in the verdict form was Two Million Dollars ($2,000,000.00). A Two Hundred Thousand Dollar figure nowhere appears in the verdict form as completed by the jury. The trial judge did not amend the jury award. The trial judge merely entered judgment, in accordance with *Lippard,* for Two Million Dollars on the strict liability theory, for Two Hundred Thousand Dollars on the negligence theory, with the proviso that the amount recoverable under the negligence theory would not be in addition to the amount recoverable under the strict liability theory. See Appendix at A-24-25. This judgment was perfectly correct under Missouri law. FMC inappropriately palters by referring to the jury verdict as one "for Two Hundred Thousand Dollars" and by making it appear that the trial judge entered an additur.

FMC concedes that the only difficulty with the verdict form is contained in the closing "note". See Appendix at A-7. In seeking certiorari on this basis, FMC conveniently omits any discussion of the actual jury instructions in this case. In its opinion in this case, 892 F.2d at 1378, the Eighth Circuit expressly held that the actual jury instructions in this case "were quite clear that the jury finding on comparative fault does not so apply" to the strict liability theory. See Appendix at A-10. The Eighth Circuit stated that the actual jury instructions properly instructed the jury that comparative fault principles do not apply to strict liability claims. The Eighth Circuit also recognized that the actual jury instructions advised the jury that the percentage of fault assessed to plaintiff under the negligence theory would *only* affect the recovery on that negligence theory. See Appendix at A-9.

The Eighth Circuit utilized the appropriate standard of appellate review with regard to jury instructions when it stated:

> "As a whole, the instructions correctly and specifically instructed the jury about the ambiguities the [verdict] form

> may have created. Given this correct and explicit instruction, it is mere speculation that the jury calculated total damages at $2,000,000.00 in anticipation of a reduction for plaintiff's comparative fault on the negligence claim." 892 F.2d at 1378-79. See Appendix at A-10.

Given this very explicit finding by the Eighth Circuit, there is simply no issue presented which is worthy of consideration by this Court on a Petition for Writ of Certiorari under Supreme Court Rule 10.1(a). This is particularly true, as more fully set forth in Point VI of this Brief, because FMC failed to make any specific objection to the closing "note" in the verdict form under Rule 51, Fed.R.Civ.Pro., and failed to offer an alternative verdict form or clarifying language.

VI

THE ISSUE INVOLVING THE CONCLUDING "NOTE" IN THE VERDICT FORM DOES NOT PRESENT AN APPROPRIATE CASE FOR REVIEW BY CERTIORARI WHERE THE PETITIONER MADE NO SPECIFIC OBJECTION TO THAT "NOTE" UNDER RULE 51, FED.R.CIV.PRO., AND FAILED TO TENDER AN ALTERNATIVE VERDICT FORM OR CLARIFYING LANGUAGE.

At trial, the only comment that counsel for FMC had with respect to the verdict form is reflected at R., Vol. 3, page 209, as follows:

> " MR. VENKER: The only objection that I had to it, Your Honor, was that I stated earlier and that is just that I think with two verdict directors on two different theories there should be two verdict forms. I mean I've seen this this morning for the first time and haven't had a chance to draft my own, but I would just say simply that they ought to be separate and not put together in the same verdict form."

Rule 51, Fed.R.Civ.Pro. provides in pertinent part, as follows:

> " . . . No party may assign an error the giving or the failing to give an instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection . . ."

The only complaint relating to alleged instructional error made by petitioner FMC, pertains to the concluding "Note" on the verdict form used at trial. At no time during trial did FMC ever raise any issue with regard to that concluding "note". The only objection made at trial by FMC with respect to the verdict form was the suggestion by FMC that the claims based on theories of negligence and strict liability should be submitted by way of separate verdict forms on each theory.

As such, FMC has waived any allegation of error with respect to that verdict form on the grounds asserted in its Petition. *Rouse v. Chicago, Rock Island & Pacific Railroad Co.*, 474 F.2d 1180, 1184 (8th Cir. 1973); 9 C. Wright & A. Miller, *Federal Practice & Procedure*, Sec. 2551 and 2553 (1971).

> "A party may not state one ground when objecting to an instruction and attempt to rely on a different ground for the objection on appeal or on a motion for a new trial. Nor will an objection to one part of the charge permit a party to assert error later in a different part of the charge." *Id.* at 645, 646.

FMC had every opportunity to appropriately object to the concluding note in the verdict form. It failed to do so. FMC had every opportunity to tender an alternative verdict form. It failed to do so. FMC had every opportunity to suggest a clarification or amendment to the verdict form used by the District Court. It failed to do so. FMC had every opportunity to tender a special verdict form submitting special interrogatories recommended for a product liability case submitting

both negligence and strict liability, which may be found at *Federal Jury Practice & Instructions,* Devitt, Blackmar & Wolff, Vol. 3, Fourth Edition, Sec. 74.12. FMC failed to do so.

At no time did FMC object or attempt to clarify the "note" which it now contends would have made the verdict form more clear to the jury. Also, at no time during final argument did FMC ever explain to the jury the effect of the joint submission of negligence and strict liability theories. FMC had every opportunity to argue these issues to the jury. FMC failed to do so.

Under these circumstances, this case does not present an appropriate issue for review by certiorari by this Court. This is especially true by virtue of the fact that the Eighth Circuit expressly held that the concluding "note" in the verdict form was legally correct and did not misstate Missouri law. 892 F.2d at 1377. See Appendix at A-8.

CONCLUSION

For the foregoing reasons, FMC's Petition for Writ of Certiorari should be denied.

Given the numerous omissions of fact and law by FMC in its Petition for Writ of Certiorari, this Court may wish to consider application of Supreme Court Rule 42.2 or a direction to the District Court to consider application of Rule 11, Fed.R.Civ.Pro.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 88-2823

Todd Gander,
Appellee,

v.

FMC Corporation,
Appellant.

Appeal from the United States
District Court for the Eastern
District of Missouri.

Submitted: September 13, 1989

Filed: January 12, 1990

Before ARNOLD, Circuit Judge, HENLEY, Senior Circuit Judge, and BEAM, Circuit Judge.

BEAM, Circuit Judge.

FMC Corporation appeals a judgment in favor of Todd Gander for $2,000,000, entered on July 13, 1988, following a jury trial. Gander's theories of recovery for personal injuries sounded in both strict liability in tort and negligence, and the jury found in favor of Gander on both claims. The jury also

assessed Gander's comparative fault on the negligence claim at 90%. On appeal, FMC argues that the verdict form was confusing and misstated the law, and that the district court should have allowed FMC to cross-examine Gander's witnesses about the effects of income tax assessments on Gander's lost income. While we have some reservations about the verdict form, we affirm.

I. BACKGROUND

Gander lost his right arm at the elbow on February 23, 1985, while working for Anheuser-Busch in St. Louis. Gander worked as a coal conveyor operator, and made $34,560 plus benefits in 1984. At the time of trial in 1986, the average pay for coal conveyor operators was $47,891 plus benefits.

As a coal conveyor operator, Gander's work entailed shepherding coal from its entry into the plant to the boilers where it was converted to electrical energy. The conveyor belts which transported the coal frequently would ride to one side of their drive drums as the result of coal dust accumulating on the drums. When the conveyor belt rode to one side, it would often climb the wall, causing coal spills.

On February 23, 1985, Gander was working near a head pulley drum which had become clogged with coal, and which was partly responsible for a major coal spill. Gander had been taught to clean the drum with a fox tail brush, without shutting off the system. Gander thus proceeded to clean the drum with the fox tail brush, but the rolling drum caught the fox tail brush, pulling Gander's forearm into the device before he was able to let go. The rolling drum literally lifted Gander off the ground, and his arm was severed at the elbow when it came into contact with a shear guard. Fellow workers took Gander to Barnes Hospital where his arm was reattached.

Although Gander's surgery was successful to the extent that he still has his right arm, he testified at trial that the arm is

essentially useless. "It's just like an ornament hanging on, it's no good." Trial Transcript, vol. 1, at 122. He has only limited movement in his shoulder and must wear a brace to keep his wrist straight. It otherwise flops limply. Gander has no feeling in his fingers, has lost his fingernails, and must wear a glove on his hand to prevent swelling. Gander's useless right arm causes him problems with minor things, like buttoning the top of his shirt or tying his shoe laces; Gander testified that these problems cause him to be frustrated and irritable. Moreover, attempts at vocational rehabilitation were unsuccessful, and Gander was discharged from Anheuser-Busch on August 31, 1987. He now does some volunteer work at a local hospital. The trial testimony indicated that the injury has enormously changed Ganders life.

As indicated, the case was tried to a jury on theories of strict products liability and negligence. The single verdict form submitted to the jury contained reference to both theories. Part I required a verdict on the strict liability claim. Part II required the jury to assess the comparative fault of the plaintiff and the defendant in the event that it found for the plaintiff or the negligence claim. Part III required the jury to assess total damages. The jury found for Gander on both theories, assessed Gander's fault at 90%, and found total damages to be $2,000,000.

After the jury was dismissed, however, the district court expressed doubt about whether the jury verdict was for $2,000,000 or for $200,000; i.e., $2,000,000 total damages reduced by the 90% fault assessed to Gander. The district court initially entered judgment for $200,000. On Gander's motion to amend the judgment, however, the court decided that Gander was entitled to $2,000,000 on the strict liability claim, which could not be reduced by Gander's comparative fault under Missouri law. This appeal followed.

II. DISCUSSION

A. The Verdict Form

FMC argues on appeal that the district court erred both in submitting to the jury Gander's verdict form, which it argues was confusing and inaccurate, and in amending judgment. While the arguments are closely related and both ultimately turn on whether the verdict form correctly stated Missouri law, we treat the arguments separately.

The verdict form was submitted by Gander, and was taken from the Missouri Approved Jury Instructions. MAI 35.15 illustration (3d ed. Supp. 1989) (the form is indicated as Verdict A, and is taken from MAI 36.01 and 37.07). The form used is approved, at least as an illustration, by the Missouri Supreme Court for the submission of both strict liability and negligence claims, and was new at the time of trial. Brief for Appellant at 9. It contains three parts,[1] the first dealing with the strict liabili-

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[1] Beginning with Part I, the verdict form reads as follows:

NOTE: Complete this form as required by your verdict.

On the claim of plaintiff Todd Gander for personal injury based on the theory of strict liability against defendant FMC/Link-Belt Corporation, we, the jury, find in favor of: _____

* * *

PART II

NOTE: Complete the following by filling in the blanks as required by your verdict on the claim of plaintiff for personal injury based on the claim of negligence whether or not you found in favor of plaintiff on his claim for personal injury based on product defect. If you assess a percentage of fault to any of those listed below, write in a percentage not greater than 100%. Otherwise, write in "zero" next to that name. If you assess a percentage of fault to any of those listed below, the total of such percentages must be 100%.

On the claim of plaintiff for personal injury based on negligence, we, the jury, assess percentages of fault as follows:

* * *

ty claim, the second with comparative fault on the negligence claim, and the third with total damages. The difficulty the district court had, and the arguable error in the form, stems from the closing note, which explains the reduction in damages for plaintiff's comparative fault on the negligence claim.

After the jury had been dismissed, FMC remarked that the verdict appeared to be $200,000; i.e., $2,000,000 total damages reduced by the 90% fault assessed to Gander. Trial Transcript, vol. 3, at 270. Gander argued that the verdict was for 12,000,000, since the jury found for Gander on the strict liability claim, which could not be reduced by Gander's comparative fault. *Id.* at 272. The district court replied: "Not based on the note on part three." *Id.* After quoting the note, the court continued: "This is directing me to reduce that by 90 percent." *Id.* at 274. The district court then entered judgment for $200,000.

> NOTE: If you assessed a percentage of fault to any defendant on plaintiff's claim for personal injury based on negligence, the judge will reduce the total amount of plaintiff's damages by any percentage of fault you assess to plaintiff.

Upon Gander's motion to amend, however, the district court decided that it had improperly reduced the total damages by the

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PART III

NOTE: Complete the following paragraph if you find in favor of plaintiff on his claim for personal injury based on product defect or if you assessed a percentage of fault to any defendant on plaintiff's claim for personal injury based on negligence.

We, the jury, find the total amount of plaintiff's damages disregarding any fault on the part of plaintiff to be _____

* * *

NOTE: If you assessed a percentage of fault to any defendant on plaintiff's claim for personal injury based on negligence, the judge will reduce the total amount of plaintiff's damages by any percentage of fault you assess to plaintiff.

percentage of comparative fault assessed to Gander. "Inasmuch as this is a case in which comparative negligence principles apply only to the jury's determination on the negligence claim and not to the strict liability claim, the jury's findings as reflected on the verdict form entitle plaintiff to a judgment in the amount of Two Million Dollars ($2,000,000)." Memorandum and Order, No. 87-1155C(6), July 13, 1988, at 2.

To the extent that FMC argues that the district court erred in amending its judgment, we disagree. "The decision to grant or deny a Rule 59 motion is committed to the sound discretion of the trial court." *A.W. v. Northwest R-1 School Dist.*, 813 F.2d 158, 165 (8th Cir.), *cert. denied*, 484 U.S. 847 (1987); *Slater v. KFC Corp.*, 621 F.2d 932, 939 (8th Cir. 1980). Under Missouri law, which we are bound to apply in this diversity case, *see Walker v. Paccar, Inc.*, 802 F.2d 1053, 1055 (8th Cir. 1986), the district court was correct in amending the judgment. Missouri law is clear that a verdict resting on a strict liability claim cannot be reduced by a plaintiff's comparative fault. In *Lippard v. Houdaille Indus.*, 715 S.W.2d 491 (Mo. 1986), the Missouri Supreme Court held that "the plaintiff's contributory negligence is not at issue in a products liability case." *Id.* at 493. The court explained that negligence on the part of plaintiff should neither prohibit nor reduce plaintiff's recovery on a strict liability claim. "We adhere to the view that distributors of 'defective products unreasonably dangerous' should pay damages for injuries caused by the products, without reduction because a plaintiff may have been guilty of a degree of carelessness." *Id.* at 494. As defense counsel admitted at oral argument, the judgment of $200,000 under the strict liability theory was clearly incorrect as a matter of Missouri law. Therefore, we find no abuse of discretion by the district court.

This does not, however, end the matter. FMC's argument is better stated in terms of the verdict form's correctness. That is, the fact that the amended judgment properly reflected Missouri law does not mean that the verdict form itself did not misstate

Missouri law or unduly confuse the jury. Thus, FMC argues that the form was incorrect as a matter of law, or, in the alternative, that it was so confusing that the intent of the jury is unclear. The jury may, indeed, have been misled by the closing note, which could be read (as first read by the district court) to apply comparative fault to the strict liability claim as well as to the negligence claim. On its face, the note is not specifically limited to one negligence claim. Nor does the note specifically apply to the strict liability claim. Because of this ambiguity, the jury, according to FMC, may have been led to conclude that total damages would be reduced by any percentage of fault assessed to Gander, even though it found in Gander's favor on the strict liability claim. Hence, FMC argues, the jury probably intended that Gander receive only $200,000, and thus assessed total damages of $2,000,000 because it thought that total damages would be reduced by 90%. We must, therefore, consider whether the verdict form is legally incorrect or unduly misleading.

While it is a close question, we do not think that the verdict form misstates Missouri law. FMC agreed at oral argument that the difficulty with the form stems from the closing note, which, as indicated, can be read to require a reduction, based on plaintiff's comparative fault on the negligence claim, in the strict liability claim. Although the note leaves open this possibility, it does not, as the district court initially thought, *require* it. Because of its grammatical structure and location, the note is somewhat misleading. The note can be read to indicate a connection between a finding of contributory fault on the negligence claim and a reduction in total damages. *If* the jury assesses a percentage of fault to any defendant, *then* "the judge *will reduce*" total damages accordingly. The reduction in damages thus can be caused by the jury assessing fault, regardless of any finding on the strict liability claim. While this is a possible reading of the note, it is not a required reading.

However, as a matter of law, the note is not incorrect; it is simply unclear. Given that Missouri law is clear that the judge

cannot apply comparative negligence principles to the strict liability claim, the strict liability claim will, in fact, be unaffected by any percentage of fault assessed to plaintiff on the negligence claim. The note does not require otherwise, and thus is not legally incorrect. It does not misstate Missouri law.

The verdict form is, however, at least potentially confusing to the jury.[2] We must, therefore, consider whether the form, taken together with the instructions to the jury, is so misleading or confusing that the jury verdict cannot stand. In determining whether the verdict form is confusing, we must consider it in light of the instruction given. *See United States v. Hines,* 728 F.2d 421, 427 (10th Cir.), *cert. denied,* 467 U.S. 1246 (1984). It is enough if the "charge as a whole . . . state[s] the governing law fairly; technical imperfections or a lack of absolute clarity will not render the instructions erroneous." *Toro Co. v. R & R Products Co.,* 787 F.2d 1208, 1215 (8th Cir. 1986). We find that the jury was correctly and adequately instructed on Missouri law, and, therefore, that the verdict form, not clearly wrong, also is not so confusing that the jury verdict must be upset.

The important inquiry is whether the jury was properly instructed that damages were to be calculated regardless of any fault assessed to plaintiff on the negligence claim. Initially, we note that the verdict form itself is clear and correct on this matter. In Part III, in which the jury finds total damages, the form states: "We, the jury, find the total amount of plaintiff's

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[2] Although we hold that the verdict form is technically correct, and that we cannot set aside the jury verdict in this case, we recommend that the form not be used by the federal district courts of this circuit as presently written. The form could be substantially clarified by simply eliminating the concluding note, which FMC agreed at oral argument is the main problem with the form. MAI 37.03 as written in the MAI 35.15 illustration clearly and correctly instructs the jury on the same matters which the concluding note attempts to cover. The note is, therefore, unnecessary. If a note is deemed to be required, several alternative versions that clarify the problem readily come to mind.

damages *disregarding any fault on the part of plaintiff* to be ____" (emphasis added). This instruction that comparative fault is *not* to be considered in calculating total damages is much clearer than is any inference from the concluding note that might lead the jury to inflate total damages in anticipation of a reduction for plaintiff's comparative fault on the negligence claim. Instruction number 18 further provided that, if the jury found in favor of Gander on the strict liability claim, or assessed a percentage of fault to FMC on the negligence claim, then

> disregarding any fault on the part of plaintiff, you must determine the total amount of his damages to be such sum as will fairly and justly compensate him for any damages you believe he sustained and is reasonably certain to sustain in the future as a direct result of the occurrence mentioned in the evidence.

Moreover, the jury was specifically instructed, through instruction number 18, that it should calculate total damages regardless of plaintiff's fault. "In determining the total amount of plaintiff's damages, you must not reduce such damages by any percentage of fault you may assess to plaintiff." Instruction number 18, *see also* MAI 37.03 (3d ed. 1989 Supp.). Thus, the district court correctly instructed the jury that its function was not to determine the amount of plaintiff's recovery, but to determine the amount of plaintiff's total damages. Any efforts by the jury to calculate damages in terms of plaintiff's recovery would be contrary to the court's instructions.

Not only was the jury properly instructed on its role in calculating damages, but the district court also properly instructed the jury that comparative fault principles do not apply to strict liability claims. Instruction number 18 provided that: "The judge will compute any recovery *on plaintiff's claim for personal injury based on negligence* by reducing the amount you find as plaintiff's total damages by any percentage of fault you assess to plaintiff." Instruction number 18, *see also* MAI 35.15

illustration (3d ed. Supp. 1989) (emphasis added).[3] Thus, while the verdict form may be unclear about whether its concluding note applies to the strict liability claim, the instructions were quite clear that the jury finding on comparative fault does not so apply. As a whole, the instructions correctly and specifically instructed the jury about the ambiguities the form may have created. Given this correct and explicit instruction, it is mere speculation that the jury calculated total damages at $2,000,000 in anticipation of a reduction for plaintiff's comparative fault on the negligence claim.

Moreover, mere speculation that a jury verdict may have been based on the jury's own misunderstanding of the law, even though properly instructed, is an insufficient basis on which to upset a jury verdict. "It is well settled that a jury's misunderstanding of testimony, misapprehension of law, errors in computation or improper methods of computation, unsound reasoning or other improper motives cannot be used to impeach a verdict." *Chicago, Rock Island & Pacific R.R. v. Speth,* 404 F.2d 291, 295 (8th Cir. 1968). In *Speth,* the jury assessed plaintiff's contributory negligence at 40% and awarded $16,000 in damages. The district court, *sua sponte,* asked the jury whether its damage award was net or gross. The jury responded that its calculation was a net figure, compensating for plaintiff's contributory negligence. The jury thus intended for plaintiff to recover $16,000. When the district court sent the jury back to recalculate damages, it returned with a figure of $40,000. On appeal, this court reversed and remanded for a new trial on the issue of damages. *Id.* at 296. This is not to say, however, that when a jury verdict "on its face shows a clear disregard for the court's in-

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[3]MAI 37.03, from which the illustration is drawn, differs materially from the illustration and from the instruction given at trial. MAI 37.03 does not discuss alternate theories of liability submitted to the jury, and thus the specific reference to Gander's claim based on negligence, emphasized in the text above, varies from MAI 37.03.

structions," *id.* at 295, it cannot be corrected. But given correct instruction on the law and no clear disregard for that instruction on the face of the verdict, a jury verdict must remain immune from questioning by the district court and from speculation by an appellate court that the verdict may be based on a misunderstanding of the law. Whether the jury misunderstood a correct instruction of the law is an improper subject for mere speculation. *See* 6A J. Moore, *Moore's Federal Practice* ¶ 59.08[4], at 59-115 to 116 (1989) ("a verdict cannot be upset by speculation"); *id.* at 59-127 ("A mere suspicion, however, that the jury has not followed the court's instructions is not sufficient, since that would make the verdict too vulnerable and would needlessly prolong litigation."); *Peveto v. Sears, Roebuck & Co.*, 807 F.2d 486, 490 (5th Cir. 1987) ("Whether or not the jury misunderstood the charge of the court is not a question to be reexamined after the verdict has been rendered.") (citation omitted).

Our holding finds support as well in the cases which, based on Federal Rule of Evidence 606(b), forbid improper impeachment of a jury verdict. While no improper impeachment occurred in this case, Rule 606(b) establishes that it would have been improper to inquire of the jurors what they really intended by their verdict. In *Karl v. Burlington Northern Ry. Co.*, 880 F.2d 68 (8th Cir. 1989), the jury returned a verdict in a personal injury action in favor of plaintiff. *Id.* at 69. The jury found plaintiff to be 75% at fault, *id.* at 70 n.3, and assessed damages at $273,750. The jury was instructed to assess damages "without taking into consideration any reduction of the plaintiff's claim due to her own negligence." *Id.* at 70 n.4. The district court, however, called the jury foreman at the request of plaintiff's counsel, to determine whether the jury calculated damages without regard for plaintiff's contributory negligence. *Id.* at 71. The jury foreman explained that $273,750 was 25% of what plaintiff asked for, and was what the jury intended plaintiff to recover. *Id.* The district court then amended judgment to reflect actual damages of $1,095,000. *Id.* at 72.

This court reversed the amended judgment. Relying on Rule 606(b), which provides that a juror may not testify about the jury's thought processes during deliberations for purposes of impeaching the verdict, we found the amendment to be improper. *Id.* at 73-74. The impeaching testimony concerned "how the jury interpreted the court's instructions, and concerns the jurors' 'mental processes.' " *Id.* at 74. The testimony, therefore, violated Rule 606(b). Given that "there is no other indication that the jury's first verdict was deficient," *id.* at 75, this court remanded to reinstate the first verdict.

Similarly, while no impeachment of the jury verdict took place in this case, any inquiry by the district court would have been improper. Nor is there any "other indication that the jury's verdict was deficient." We are, therefore, unwilling to speculate that the jury, even though properly instructed, misunderstood the law and, therefore, did not intend to award plaintiff damages of $2,000,000. *See also Scogin v. Century Fitness, Inc.*, 780 F.2d 1316, 1320 (8th Cir. 1985); *Peveto*, 807 F.2d at 489.

Finally we find it persuasive that the evidence of damages in this case is sufficient to support the jury's calculation of damages of $2,000,000. The uncontradicted figures for lost wages, past and future, provided by plaintiff's expert witness, Viscusi, establish damages in excess of $2,000,000. Viscusi testified that at the contract wage for an oiler (all Anheuser-Busch oilers were actually paid more), Gander's lost wages for the next twenty seven years would be $1,395,711. Trial Transcript, vol. 1, at 316. Given Gander's substantial earnings growth of 15% for the four years prior to the accident, *id.* at 307, Viscusi called this figure "ludicrous." *Id.* at 317. Rather, Gander's lost wages were more accurately reflected by considering wages for the average oiler, and would be closer to $1,693,000. *Id.* at 318. Viscusi also gave lost wage scenarios which calculated Gander's wage growth at better than the rate of interest, and gave figures ranging from $1,808,714 to $2,217,761. *Id.* at 320-22. Gander's

counsel used these figures, together with past wage losses, medical bills and pain and suffering, to argue for $3,000,000 in damages. *Id.* vol. 3, at 234-35.[4]

Nor were these figures at all excessive in light of Gander's injury. Gander's physician testified that Gander's right arm is almost useless; that he has no use of his fingers, which frequently swell and develop ulcers; that he has permanent, burning pain in his thumb, index and middle fingers, which are otherwise numb; that he must wear a splint to support his wrist and a glove to keep down the swelling in his hand; that his arm is subject to injury and heals slowly; that the swelling in his arm is likely permanent; and that Gander's arm is 95% permanently disabled. *Id.* vol. 2, at 34-59.

Gander's psychiatrist also testified that the injury has caused substantial psychological problems. When Gander first contacted the psychiatrist, he was severely depressed and suicidal, and had to be hospitalized for treatment. *Id.* at 75. The psychiatrist still sees Gander monthly, and testified that his symptoms are in a constant state of flux. *Id.* at 80. While Gander is no longer suicidal, the scars on his body from skin grafts, nerve and vein transplants, and muscle harvesting are devastating to Gander's self-image. *Id.* at 77. Gander is also easily frustrated and irritable, suffers from insomnia, a decreased interest in intimacy with his wife, feelings of hopelessness and worthlessness, and generally has a poor outlook for the future. *Id.* at 90. Moreover, the psychiatrist testified that, on the basis of psychology alone, Gander should not return to work, where he would likely be frustrated and perhaps disposed to again think of suicide. *Id.* at 84. The psychiatrist testified that Gander's long range outlook is poor. *Id.*

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[4] While counsel said at oral argument that Gander asked for $4,900,000 in damages, the trial transcript contains only the $3,000,000 figure. Trial Transcript, vol. 3, at 234-35.

Thus, given the substantial evidence supporting the jury's calculation of damages at $2,000,000, the correct instruction of the law, and mere speculation that the jury may have intended to award Gander only $200,000, we cannot set aside the jury verdict on the ground that the verdict form was unclear.

B. Income Taxes

FMC next argues that the district court erred in not permitting cross-examination of Gander's witnesses about the effect of income taxes on Gander's lost income. FMC first attempted to cross-examine Viscusi, the economist who testified about Gander's lost wages, FMC asked Viscusi whether the figures he was using were in terms of gross income. Counsel then asked whether Gander would actually get those gross dollars, to which Gander objected. Trial Transcript, vol. 1, at 340-41. At the bench, Gander said that under Missouri law, income tax assessments were inappropriate subjects for cross-examination, and that any contrary holdings from FELA cases could not apply in this diversity case. *Id.* at 342. FMC suggested that it should be able to cross-examine the economist, but when asked by the court whether the law was clear that such cross-examination was permissible, FMC counsel responded: "I think I can." *Id.* at 343. The district court allowed FMC to cross-examine on income taxes, but also said that it would grant a mistrial if Gander were able to show that such cross-examination was improper. *Id.* at 344. FMC made no further efforts to cross-examine Viscusi about income taxes.

The second exchange over income taxes occurred at the bench, when FMC presented to the court *Nesselrode v. Executive Beachcraft, Inc.*, 7070 S.W.2d 371 (Mo. 1986), which FMC said permitted cross-examination on income taxes. Trial Transcript, vol. 2, at 2-3. The district court noted, however, that *Nesselrode* made the law no clearer, and thus adhered to its original ruling. *Id.* at 4.

FMC then attemped to cross-examine Crawford, Gander's witness from the union. Counsel asked Crawford, who testified

about wages earned by coal conveyor operators at Anheuser-Busch, whether his figures were net or gross. Gander objected on the basis of the previous discussions, and this time the objection was explicitly sustained. *Id.* at 70-71.[5]

Finally, FMC tendered an instruction on reduction to present value, which it then linked to the issue of whether the total award was subject to income taxation. *Id.* vol. 3, at 214-15. Gander objected to the instruction and the court agreed, thus precluding FMC from arguing the taxability of the award to the jury. *Id.* at 215.[6] It is somewhat unclear from the objections and the discussions at trial whether FMC appeals from the district court's rulings on cross-examination or from the district court's refusal to instruct the jury that the judgment was not subject to income taxation. In either case, however, Missouri law is clear that the trial court did not err in its rulings.

We must first consider the appropriate governing law, for FMC argues in its brief that these issues are controlled by *Norfolk & Western Ry. v. Liepelt,* 444 U.S. 490 (1980) and *Jones & Laughlin Steel Corp. v. Pfeifer,* 462 U.S. 523 (1983). In *Liepelt,* and FELA action, the Supreme Court considered whether the

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[5] While the district court's initial ruling on Gander's first objection to FMC's cross-examination was to conditionally allow it subject to the same sort of cross-examination. Thus, while Gander argued at oral argument that FMC could not appeal from the district court's ruling in its favor, we think that FMC's claim that it was effectively prohibited from undertaking its proposed cross-examination is essentially accurate.

[6] It is clear that the prior discussions related only to cross-examination about the effects of income taxes on Gander's lost income. With reference to the present value instruction and proposed argument on income taxes, however, FMC makes reference to Gander's income tax liability on the judgment, a different matter. Trial Transcript, vol. 3, at 215. FMC may have been concerned that the jury would inflate the judgment to compensate for income taxes if it were not informed that the judgment is not subject to income tax.

jury should receive both evidence of the effect of income taxes on lost wages and an instruction on the taxability of a final award. As to the effects of taxes on a lost income stream, the Supreme Court held that such evidence was neither too speculative nor complex for a modern jury to understand, and thus, was proper to establish after-tax earnings. *Liepelt,* 444 U.S. at 494. The Supreme Court also held that it was error to refuse to give an instruction that the final award was not subject to income tax. *Id.* at 498.[7] FMC argues that these cases establish that the district court erred in its rulings.[8]

These cases, however, are not controlling. We have specifically held, in *Adams v. Fuqua Indus.,* 820 F.2d 271 (8th Cir. 1987), that *Liepelt* does not control in non-FELA cases. In *Adams,* appellant argued that the rationale of *Liepelt* transcends the FELA context and that it should, therefore, apply in diversity actions. *Id.* at 276. This court rejected the argument, and, in considering an instruction on the taxability of an award, held that: "Whether to give or withhold a taxability instruction is a question of state law, which we are bound to follow." *Id.* at 277. More generally, the law is perfectly clear that "when a tort action is brought in federal court pursuant to diversity jurisdiction, basing liability on state law, the court must apply state law in regard to availability and computation of damages." *Id.* (quoting *Losey v. North American Philips Consumer Electronics Corp.,* 792 F.2d 58, 61-62 (6th Cir.

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[7] The Supreme Court relied in part on the Missouri case, *Dempsey v. Thompson,* 363 Mo. 339, 251 S.W.2d 42 (1952). The approved instruction was as follows: "Your award will not be subject to any income taxes, and you should not consider such taxes in fixing the amount of your award." *Liepelt,* 444 U.S. at 492.

[8] *Jones & Laughlin* essentially follows *Liepelt,* and holds that in calculating a lost income stream, income tax evidence is appropriate. "Since the damages award is tax-free, the relevant stream is ideally of *after-tax* wages and benefits. *Jones & Laughlin,* 462 U.S. at 534.

(1986)). Moreover, this court in *Adams* specifically rejected a Seventh Circuit case[9] which applied *Liepelt* in a diversity case. We defer instead to "Missouri's right to create its own law free from federal interference." *Adams,* 820 F.2d at 278. Thus, we apply Missouri law.

Missouri law is clear that it is not error for a court to refuse to give an instruction that an award is not subject to income taxation. At one time, Missouri law favored such an instruction. In *Dempsey v. Thompson,* 363 Mo. 339, 251 S.W.2d 42 (1952), an FELA case, defendant argued error in the court's refusal to give an instruction that no income tax would be assessed on the judgment. *Id.* at 43-44. The Missouri Supreme Court agreed, finding no reason not to give the instruction, especially given the danger that the jury could incorrectly overcompensate for taxes on the judgment. It was, therefore, error to refuse the instruction. *Id.* at 45. More recent Missouri cases, however, establish that *Dempsey* has been superseded by Missouri Approved Jury Instructions (MAI) outside of the FELA context, and that it is not error to refuse such an instruction.

The Missouri Court of Appeals reviewed several decisions on this issue in *Tennis v. General Motors Corp.,* 625 S.W.2d 218 (Mo. Ct. App. 1981). Noting that *Dempsey* was an FELA case and was decided before the Missouri Approved Jury Instructions were approved by the Missouri Supreme Court, the court explained its ruling in *Senter v. Ferguson,* 486 S.W.2d 644 (Mo. Ct. App. 1972), in which the court held that it was error to give the same instruction given in *Dempsey.* In *Tennis,* the court explained that *Senter* was a post-MAI case, and that MAI 4.01, not *Dempsey,* controlled the instruction issue in a non-FELA case. MAI 4.01, the only permissible and authorized damage instruction in a non-FELA case, explicitly did not incorporate the

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[9] *In re Air Crash Disaster,* 701 F.2d 1189 (7th Cir.), *cert. denied,* 464 U.S. 866 (1983).

Dempsey FELA instruction. Thus, to give the instruction would be error, since the instruction is "clearly an addition to or 'modification' of MAI 4.01." *Tennis,* 625 S.W.2d at 226. Moreover, the second edition of MAI did not include the *Dempsey* instruction even in its damage instructions for FELA cases, MAI 8.01 and 8.02. Following the Supreme Court decision in *Liepelt,* however, both FELA instructions were modified in the third edition to contain the charge that " 'any award you may make is not subject to income tax.' " *Id.* at 227. "It seems worthy of note that although FELA instructions MAI 8.01 and 8.02 were changed in the 3rd Edition of MAI in compliance with *Norfolk,* MAI [4.01] has not been altered nor amended to include a direction that any awarded damages are 'not subject to income tax.' " *Id.* Thus, in *Tennis,* the Missouri Court of Appeals found no error in the lower court's refusal to give the instruction in a non-FELA case.

Again, in *Kenton v. Hyatt Hotels Corp.,* 693 S.W.2d 83 (Mo. 1985), appellant argued error in the court's refusal to give a similar instruction. *Id.* at 96. The Missouri Supreme Court reviewed the law, and affirmed the lower court. "The trial court here cannot be convicted of error, requiring a new trial, in following the established law of this state." *Id.* at 96.

Thus, to the extent that FMC presented the court with an instruction that the judgment would not be subject to income taxation, we find no error in the district court's refusal to give such an instruction.

Missouri law is somewhat less clear, however, regarding the admissibility of evidence relating to the effects of income tax on a lost-income stream. The controlling case appears to be *Dempsey.* In Dempsey, defendant argued on appeal that the trial court had erred in refusing to permit defendant to cross-examine plaintiff's witness about the effects of income tax on a personal injury award. *Dempsey,* 251 S.W.2d at 43. The Missouri Supreme Court held that:

> The trial court did not err either in refusing to permit defendant to cross-examine plaintiff's actuarial witness relative to income tax liability or in refusing to permit defendant to argue to the jury that in arriving at the amount of its award it should consider only the amount of future earnings lost to plaintiff after deduction of income taxes for which he would have been liable had he continued his employment without injury.

Id. at 45. While it is unclear as to whether FMC's attempted cross-examination concerned Gander's tax liability on the award or the effects of income taxes on lost income, the Missouri court's reference to defendant's proposed argument is exactly on point. This is precisely what FMC attempted to do in this case, and it is this point of law about which FMC admitted to the district court that it was uncertain. To the extent that *Dempsey* is the controlling law, the district court did not err in refusing FMC's proposed cross-examination.

The issue is somewhat clouded, however, by *Nesselrode,* 707 S.W.2d 371. FMC argues that in *Nesselrode* the Missouri Supreme Court explicitly found the sort of cross-examination that FMC attempted to be permissible. By implication, FMC argues that *Nesselrode* silently overrules the precise holding of *Dempsey* which found no error in refusing exactly the sort of cross-examination FMC attempted. We do not agree that *Nesselrode* controls this case.

Indeed, whether a defendant can cross-examine about the effects of income taxes on plaintiff's lost income stream was not even at issue in *Nesselrode.* Rather, the context in which the court makes the reference to cross-examination on which FMC relies concerns a dispute about the reduction of lost income to present value. Both parties in *Nesselrode* argued error in failing to establish the present value of plaintiff's lost income. Specifically, defendant argued that the court should not have allowed the jury to consider a table indicating plaintiff's lost income,

since the table contained no reductions to present value. *Id.* at 385-86. The Missouri Supreme Court characterized the issue even more narrowly. It found the issue to be whether defendant could object to the trial court's ruling on plaintiff's presentation of lost income when defendant itself failed to present any evidence of present value. *Id.* at 387.

In this context, the court mentioned in passing that while defendant did not challenge plaintiff's presentation of present value, defendant did challenge plaintiff's claim for damages. "This was done by presenting evidence in connection with decedent's history of health problems, questioning the three daughters' monetary reliance on decedent, and by *pointing out through cross-examination that decedent's projected stream of lost-income does not take into consideration his income tax obligations.*" *Id.* at 388 (emphasis added). We do not believe that this passing reference to cross-examination can be interpreted in such a way as to overrule *Dempsey*. The propriety of the cross-examination was not at issue in *Nesselrode* and was not addressed by the court. Nor, apparently, was the cross-examination in *Nesselrode* the subject of an objection by plaintiff's counsel at trial. This language in *Nesselrode,* then, is just a mere, isolated reference in passing to the sort of cross-examination attempted by FMC. This same sort of cross-examination, by contrast, was specifically addressed in *Dempsey*. FMC presented no persuasive law to the district court in support of such cross-examination, and it likewise presents none here. Thus, we find no error in the district court's ruling.

III. CONCLUSION

We have considered FMC's other arguments on appeal and find them to be without merit. For the reasons stated, we affirm the judgment of the district court.

HENLEY, Senior Circuit Judge, dissenting.

I respectfully dissent.

The majority acknowledges that the note at the end of the verdict form was confusing; so confusing, in fact, that the district judge read it one way at trial, only to reach a radically different interpretation a few months later. The majority even goes so far as to recommend that the form as it is now written not be used in future cases. Nevertheless, the court is unable to conclude that use of the form was improper here.

If the district court had given an appropriate instruction that the plaintiff's fault would not reduce his recovery under the strict liability claim, I might be less concerned about the verdict form. The majority points out that the trial judge instructed the jury to find the total amount of damages "disregarding any fault on the part of the plaintiff" and that the jury was told the plaintiff's recovery for negligence would be reduced by the percentage of his fault. These directives, however, provided no guidance on whether the plaintiff's fault would affect his recovery under the strict liability claim. The jury could have understood and followed all of its instructions and still have logically interpreted the note on the verdict form to mean that the plaintiff's recovery under strict liability would be reduced by the percentage of his fault. In these circumstances, I do not believe that the "charge as a whole . . . state[d] the governing law fairly." *Toro Co. v. R & R Products Co.*, 787 F.2d 1208, 1215 (8th Cir. 1986).

There is another troublesome aspect to this case. The majority summarily dismisses without discussing the defendant's argument that the district court should have defined the term "defective condition" in instructing the jury regarding the strict liability theory. The trial judge described in explicit detail what would constitute negligence on the part of the defendant and the plaintiff. *See, e.g.*, Instruction No. 14 (instructing jury to assess a percentage of fault to the defendant if at the time the coal conveyor was sold, the conveyor "had an in-running nip point and shear edge at the transfer chute and was therefore dangerous when put to a use reasonably anticipated"); Instruction No. 16

("The term 'negligent' or 'negligence' as used in these instructions with respect to Todd Gander means the failure to use that degree of care that an ordinarily careful and prudent coal conveyor operator would use under the same or similar circumstances."). In contrast, the district court gave no description of what facts would warrant a finding that the conveyor was sold in a "defective condition," as required by the strict liability theory. Given that the district court's ultimate decision regarding the plaintiff's recovery was based on the outcome of the strict liability claim without any regard to jury's findings on the negligence cause of action, it is ironic that the jury had such explicit instructions regarding what particular facts would constitute negligence while being left with no guidance at all regarding the definition of a "defective condition."[1]

Concededly it might be permissible for a trial judge not to give an instruction regarding the definition of a "defective condition" in a single issue products liability action involving a simple consumer good. Yet I cannot agree that a jury may be left with no guidance at all on the definition in a case involving factory equipment with which few typical jurors can be expected to be familiar, and in a case where negligence is defined and the jury can infer from the verdict form that recovery on either negligence, strict liability, or both will be reduced by the percentage of plaintiff's fault.

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[1] The Missouri Supreme Court has indicated in dicta that the Missouri approved jury instructions (MAI) require that the jury not be given a definition of "defective condition." *See Nesselrode v. Executive Beachcraft, Inc.*, 707 S.W.2d 371, 378 & n.11 (Mo. 1986) (en banc); *see also Jarrell v. Fort Worth Steel & Mfg. Co.*, 666 S.W.2d 828, 837 (Mo. Ct. App. 1984). We have held, however, the MAI provide only guidance, not binding authority, for the giving of instructions in a federal diversity case. *See, e.g., Bersett v. K-Mart Corp.*, 869 F.2d 1131, 1134-35 (8th Cir. 1989); *cf. Cowens v. Siemens-Elema AB*, 837 F.2d 817, 822 (8th Cir. 1988) (rejecting argument that *Nesselrode* reasoning prohibited the district court in a diversity case from defining the term "unreasonably dangerous" as used in a strict liability instruction).

I recognize that the plaintiff suffered a grievous injury that might warrant a two-million dollar damage award. I am concerned, however, that the award be the result of a verdict which is free of the taints that affect the one here. Thus, I would reverse and remand for a new trial.

A true copy.

Attest:

Clerk, U.S. Court of Appeals, Eighth Circuit.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No: 87-1155C(6)

Todd Gander,
Plaintiff,

vs.

FMC Corporation,
Defendant.

JUDGMENT

(Filed July 13, 1988)

This action came before the Court and jury with the parties having appeared in person and by their respective attorneys. The issues were duly tried and the jury rendered its verdict on March 15, 1988.

WHEREAS, on the claim of plaintiff, Todd Gander, for personal injuries based on the theory of strict liablity/product defect against defendant FMC Corporation, the jury returned a verdict in favor of plaintiff, Todd Gander.

WHEREAS, on the claim of plaintiff, Todd Gander, for personal injuries based on the theory of negligence, the jury assessed percentages of fault as follows: to defendant FMC Corporation - 10%; to plaintiff Todd Gander - 90%.

WHEREAS, the jury further found the total damages of plaintiff, Todd Gander, to be TWO MILLION DOLLARS ($2,000,000.00).

WHEREFORE, it is hereby ORDERED, ADJUDGED, and DECREED on plaintiff's claim for personal injury based on the theory of strict liability/product defect, that the plaintiff, Todd

Gander, have and recover from defendant, FMC Corporation, the sum of TWO MILLION DOLLARS ($2,000,000.00), together with court costs.

WHEREFORE, it is hereby further ORDERED, ADJUDGED and DECREED that plaintiff, Todd Gander, on his claim for personal injuries based on the theory of negligence, have and recover from defendant FMC Corporation, the sum of TWO HUNDRED THOUSAND DOLLARS ($200,000.00), together with court costs.

It is further ORDERED that the amount of damages recoverable under that portion of this JUDGMENT based on the negligence theory shall not be in addition to the amount of damages recoverable under that portion of this JUDGMENT based on the theory of strict liability/product defect.

SO ORDERED:

/s/ George F. Gunn, Jr.
District Judge

DATE: 7/13/88

(3)

No. 89-1829

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

FMC CORPORATION,
Petitioner,

vs.

TODD GANDER,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

PETITIONER'S REPLY MEMORANDUM

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PETITIONER'S REPLY MEMORANDUM

INTRODUCTION

Respondent, in his opposing brief, tacitly concedes the arguments raised by FMC in its Petition for Writ of Certiorari, as respondent fails completely to respond to those arguments. Instead, respondent relies on a recounting of the severity of respondent's injury, which has never been at issue, and on arguments rehashed from his appellee's brief for the Eighth Circuit concerning preservation of error and waiver; the majority, in its opinion, either rejected those arguments explicitly or ignored them altogether. The importance and substantiality of the questions presented have not been refuted.

I.

There is a clear conflict between the circuits regarding the effect of federal income taxes on a lost income projection and regarding non-taxability of a final award. This Court should grant certiorari to resolve this conflict.

The Eighth Circuit majority's decision approved the trial judge's exclusion of evidence, argument and instruction regarding the effect of income taxes on respondent's projection of lost future income and regarding the non-taxability of a final award. The court's decision is thus in conflict with the decision of the Seventh Circuit Court of Appeals in *In re: Air Crash Disaster Near Chicago, Illinois*, 701 F.2d 1189 (7th Cir. 1983), in which the court held that it was error to refuse such evidence, argument and instruction.

Respondent, in his brief in opposition, makes *no* arguments to refute that this conflict exists, but merely states that the various circuit courts are "relatively uniform" on these issues. FMC suggests that being "relatively uniform" on an issue is akin to being "a little bit pregnant." If, as respondent concedes, there is not full uniformity between the circuits, then a conflict does exist between the circuits. This Court should grant certiorari to resolve that conflict and establish a fully uniform body of law.

A. Effect of taxes on lost income projection.

In regard to the effect of income taxes on respondent's future lost wage projection, respondent simply argues that Missouri law does not permit cross-examination on this issue. Even assuming the accuracy of respondent's position, respondent's argument fails to address the true conflict that exists. The *In re: Air Crash* court applied federal law on this question and held the cross-examination to be proper while the Eighth Circuit majority has applied state law and excluded the cross-examination. Respondent's position that Missouri law precludes such evidence begs the question of whether the Eighth Circuit appropriately applied Missouri law on this issue.

Rather than address the issue pertaining to the conflict among the circuits on this issue, respondent seeks refuge in arguments that FMC

somehow failed to preserve its claims of error in regard to its attempt at cross-examination on the effect of income taxes. The same waiver arguments were addressed *and rejected* by the Eighth Circuit in its opinion.

As the majority recognized, FMC attempted to cross-examine respondent's economics expert as to income tax effects on a lost wages projection. While the district court initially stated it would allow FMC to cross-examine on income taxes, it also said that it would grant a mistrial if respondent were able to show that such cross-examination was improper. FMC later presented further legal support for its position on the propriety of such cross-examination, but the trial court adhered to its original ruling.

Respondent then presented the testimony of a union official in an attempt to lay the foundation for respondent's lost wages projection. FMC attempted to cross-examine as to whether the official's figures were net or gross, but respondent objected on the basis of the previous discussions, and the objection was explicitly sustained. Based upon this record, the Eighth Circuit majority held:

> While the district court's initial ruling on Gander's first objection to FMC's cross examination was to conditionally allow it subject to a mistrial, the court expressly sustained this second objection to the same sort of cross-examination. Thus, while Gander argues at oral argument that FMC could not appeal from the district court's ruling in its favor, we think that FMC's claim that it was effectively prohibited from undertaking its proposed cross examination is essentially accurate.

Opinion of Eighth Circuit as included in Appendix A-24 n. 5 of FMC's Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit [hereinafter "Opinion"].[1] The majority, therefore,

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[1]As reprinted in the appendix of both FMC and respondent's original briefs, footnote 5 contains a typographical error omitting a portion of the footnote. The footnote, as it appears in the Eighth Circuit's opinion, is fully set out above. *See also* 892 F.2d at 1381 n.5.

saw through respondent's attempt to dodge the issues in this case and this Court should do the same.

Respondent also argues that the record was not adequately preserved because, following this rejection of income tax evidence, FMC did not tender a jury instruction explicitly referring to the effect of income taxes on a lost wages projection. In the instant case, however, as in *In re: Air Crash*, the trial court prevented cross-examination on the subject. Moreover, an instruction can only be given when supported by evidence presented at trial. When a trial court has made it clear that it is precluding evidence on an issue, a party does not have a duty to tender jury instructions based upon the proffered evidence that has already been clearly excluded by the court. *Cf. Socony Mobil Oil Co. v. G. C. Taylor*, 388 F.2d 586 (5th Cir. 1967) (appellant had no duty to tender instruction following court's overruling objection to subject of voir dire). By rejecting FMC's cross-examination as to the effect of income taxes on the lost wages projection, the district court effectively precluded FMC from arguing or instructing on this issue.

There is, therefore, a clear conflict between the circuit courts on this issue. In *In re: Air Crash*, the Seventh Circuit applied federal law and permitted evidence as to income tax effects on a lost income stream. In the instant case, the Eighth Circuit applied state law to reject such evidence.

B. Non-taxability of a final award.

Respondent makes a similarly flawed argument in respect to the conflict between the circuits on the propriety of instruction on the taxability of a final award. Again, respondent suggests that FMC has failed to preserve this issue on appeal and goes so far as to accuse FMC of misstating the record. It is, however, respondent's reading of the record that differs with the reading given by the Eighth Circuit Court of Appeals. The majority addressed the issue of the taxability of a final award, while stating that FMC had tendered an instruction on present value "which it then linked to the issue of whether the total award was subject to income taxation." Opinion at A-24. The majority then stated:

> With reference to the present value instruction and proposed argument on income taxes . . . FMC makes reference to Gander's income tax liability on the judgment. . . . FMC may have been concerned that the jury would inflate the judgment to compensate for income taxes if it were not informed that the judgment is not subject to income tax.

Opinion at A-24 n. 6. Respondent's reading of the record, therefore, differs with the interpretation by both FMC and the Eighth Circuit.[2] Again, the Eighth Circuit was not persuaded by respondent's attempt to avoid the substantive issues on appeal and this Court should similarly reject respondent's attempt to circumvent the issues.

Regarding the substantive issue of the propriety of argument and instruction on the non-taxability of the final award, respondent first cites decisions from four other circuits which it claims conform to the Eighth Circuit's view on this issue. This argument does not, however, dismiss the fact that there is a conflict between the Eighth Circuit's view and that of the Seventh Circuit and, in fact, emphasizes the existence of a conflict among the various circuits.

Respondent then argues that "a close reading" of the *In re: Air Crash* decision shows that there is no conflict between the circuits. A close reading of that decision, however, only serves to show that respondent has misrepresented the holdings of the court. The *In re: Air Crash* court did not merely state, as respondent suggests, that the giving of a non-taxability instruction would be harmless, but rather reversed a ruling by the district court which rejected such an instruction. *In re: Air Crash*, 701 F.2d at 1200. Respondent also represents that the Seventh Circuit "recognized that its conclusion would be different if Illinois interpreted its own substantive law to preclude *such an instruction*." Respondent's Brief at 8 (emphasis added) (citing *In re: Air Crash*, 701 F.2d at 1200 n.7). The Seventh Circuit, however, actually stated that its:

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[2] Similarly, at oral argument, respondent's counsel represented that he had asked for $4,900,000 in damages, but the Eighth Circuit, after reviewing the record, found he had only asked for $3,000,000. Opinion at A-22 n.4.

> conclusion would be different if Illinois interpreted its own substantive law to include a right to *such a possible bonus* [beyond compensatory damages].

701 F.2d at 1200 n. 7 (emphasis added). Respondent's transparent revision of the court's holding, therefore, is misleading. The court did recognize that Illinois courts would reject such an instruction, based upon their interpretation of federal law. The court merely recognized that its conclusion would be different if Illinois had a substantive interest in providing a plaintiff with windfall damages in contravention of federal tax law. Neither Missouri nor Illinois has such an interest.

The decision in *In re: Air Crash Disaster* is in conflict with the Eighth Circuit's decision in the instant case. The Seventh Circuit reversed an order of the district court refusing an instruction on the non-taxability of a final award. The Eighth Circuit has affirmed the refusal of instruction and argument on the non-taxability of a final award. There is a conflict among the circuits on this issue and this Court should grant certiorari to resolve this conflict.

II.

> In this case, in which the majority found the verdict form "misleading," "confusing," "unclear," and "ambiguous," and recommended that the verdict form never be used again in the Eighth Circuit but nevertheless upheld its use in this case, this Court's supervisory power should be invoked.

In point V of his opposing brief, respondent spends nearly three pages arguing that the judgment at issue conforms with Missouri law on strict liability and the submission of alternative theories. Those questions have never been at issue in this case, a point recognized by the Eighth Circuit majority when, after briefly dealing with those questions, it states:

> This does not, however, end the matter. FMC's argument is better stated in terms of the verdict form's correctness. That is, the fact that the amended judgment properly reflected Missouri

> law does not mean that the verdict form itself did not misstate Missouri law or unduly confuse the jury.

Opinion at A-15-16. Plainly, respondent's argument was of little interest to even the majority, and is of no consequence here. FMC does not dispute the substantive law of Missouri; instead, FMC asserts that federal law and the rulings of this Court, as set forth in the Petition, require that jury instructions and verdict forms recite the state's substantive law not only accurately, but also clearly and fairly.

Respondent next relies on the majority's observation that the instructions as a whole correctly instructed the jurors on the law. That premise was called into question, however, by Judge Henley in dissent, whose opinion is instructive on this issue:

> If the district court had given an appropriate instruction that the plaintiff's fault would not reduce his recovery under the strict liability claim, I might be less concerned about the verdict form. The majority points out that the trial judge instructed the jury to find the total amount of damages "disregarding any fault on the part of the plaintiff" and that the jury was told the plaintiff's recovery from negligence would be reduced by the percentage of his fault. These directives, however, provided no guidance on whether the plaintiff's fault would affect his recovery under the strict liability claim. The jury could have understood and followed all of its instruction and still have logically interpreted the note on the verdict form to mean that the plaintiff's recovery under strict liability would be reduced by the percentage of his fault. In these circumstances, I do not believe that the "charge as a whole . . . state[d] the governing law fairly."

Opinion at A-30 (dissenting opinion of Henley, J.) (citation omitted).

Next, in his point VI, respondent argues that FMC did not preserve any error relating to the verdict form's closing note. This gambit, again, was tried by respondent at the appellate level without success: the point was entirely ignored by the majority, which, having the trial record before it, was able to see that FMC had objected to the verdict

form at trial, had submitted verdict forms in its pre-trial compliance and supplemental instructions (as opposed to the verdict form at issue, which plaintiff unveiled for the first time at the instruction conference literally minutes before closing argument; Trial Record at vol. 3, p. 209), and had raised the issues pertaining to the verdict form and its closing note in its Motion for Reconsideration and Motion for New Trial following the trial court's reversal of its March 15, 1988 judgment. Respondent would apparently have this Court find that FMC should have both anticipated the trial judge's reversal and put no stock in either the March 15 judgment or the judge's comments on the closing note at trial:

> THE COURT: Well, "we, the jury, find the total amount of plaintiff's damages disregarding any fault on the part of plaintiff to be two million dollars."
>
> MR. HULLVERSON: That's right.
>
> THE COURT: And then the note says, "If there's assessed a percentage of fault [to] any defendant on plaintiff's claim for injury based on negligence, the Judge will reduce the total amount of plaintiff's damages by any percentage of fault you assess to the plaintiff."
>
> . . . .
>
> THE COURT: *This is directing me to reduce [the verdict] by 90%.*

Trial Record at vol. 3, p. 274 (emphasis added).

Only upon the trial court's reversal did the note become an issue. Respondent's "argument" serves only to fog the issues raised by FMC. The decisions of this Court as well as the circuit courts have long held that jury instructions must be couched in language of such definite and legal interpretation as to not mislead either the court or the jury as to its precise meaning, and that misleading instructions are grounds for reversal. In a case such as this, in which the majority found the verdict form to be "misleading," "confusing," "unclear," and "ambiguous,"

and therefore recommended that the verdict form never be used again in the Eighth Circuit, surely this Court's supervisory power should be invoked to ensure that FMC is treated as the majority would treat future litigants, and to instruct the circuit courts on the importance of their role in scrutinizing jury instructions and forms for correctness and defects.

CONCLUSION

In light of the inability of respondent to face the issues presented in FMC's Petition, the need for plenary review of these matters is indisputable; indeed, FMC suggests that summary reversal is now in order.

Respectfully submitted,

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